ISM Sdn Bhd v Queensway Nominees (Asing) Sdn Bhd & Ors and other suits

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS 22NCC-68–02 OF 2016, 22NCC-69–02 OF 2016, 22NCC-70–02 OF 2016, 22NCC-71–02 OF 2016 AND 22NCC-72–02 OF 2016
AZIZUL AZMI ADNAN J
10 APRIL 2020

Companies and Corporation — Minority oppression — Plaintiff alleged that there was minority oppression committed by defendants — Whether there was minority oppression committed by defendants — Whether a quasi-partnership existed between parties in respect of joint venture companies — Whether the terms of oral joint venture agreement were valid — Whether plaintiff could sustain a claim for oppression on a purported breach of a shareholders' agreement — Whether the case for oppression was made out — Whether directors of joint venture companies had acted for an improper purpose and in breach of their fiduciary duty — Whether plaintiff was entitled for the general, exemplary and punitive damages — Whether defendants' counterclaims should be allowed — Companies Act 1965 s 181

The plaintiff, ISM Sdn Bhd initially filed five originating summons alleging minority oppression under s 181 of the Companies Act 1965. As some of the issues in dispute turned on proof of the disputed terms of an oral shareholders' agreement, the suit was converted to a writ and the affidavits filed were converted into pleadings. The plaintiff hold 30% of the shares in the JV companies. The plaintiff was owned by Dato' Ray Cheah and his wife, Datin Teoh. They were also its directors. Dato' Ray Cheah was a property investor, property consultant and registered valuer with a considerable number of years' experience. He was the principal person dealing with the defendants in connection with the JV companies. When Dato' Ray Cheah was approached in June 2006 to assist in the rehabilitation of an abandoned project located on the junction of Jalan Imbi and Jalan Sultan Ismail called CN Gallery. The property sat on two pieces of land, Lots 1282 and 1283 ('CN lands'). The proprietor of the CN lands was a company that had obtained credit facilities from a wholly-owned subsidiary of MPHB. Dato' Ray Cheah testified that he considered the abandoned development on the CN lands was too small to be developed into a mixed-use commercial development of significant value, but that, because of its prime central location, it and the lots adjoining them could be turned into a large-scale integrated commercial development. He conceived a plan by which the adjoining lots could be acquired and developed on an integrated basis, referred to here as the 'Imbi Project'. Dato' Cheah was however informed that MPHB was about to acquire the abandoned project. As

part of the debt repayment process, the CN lands were eventually sold to MP Factors Sdn Bhd, a wholly-owned subsidiary of MPHB. It was common ground between the parties that there existed an agreement between MPHB and ISM regarding the joint venture undertaken for the Imbi Project. It was also not in dispute that the parties agreed that ISM would hold 30% of the equity in any joint venture company incorporated to undertake the project, while MPHB would hold the remaining 70%. Dato' Cheah testified that five different JV companies had been used in order that the acquisitions be carried out in a discreet manner and without alerting the owners of the individual lots that there was a single purchaser that was proposing to amalgamate the lots into a single development. If that information had gone into the public domain, the whole project may run the risk of being held to ransom by a single owner. This strategy was undertaken upon Dato' Cheah's advice. Much of the remainder of the terms of the joint venture was in dispute between the parties. The core of the dispute surrounded the obligations of the respective parties to provide funding to the JV companies. The plaintiff's position was that the funding for the JV companies was to be divided into a cash portion and a loan portion, apportioned on a 30:70 basis. Of the cash portion, ISM would be liable to contribute 30% (in other words, 30% of 30%, or 9% of the total funds required in respect of each JV company). The plaintiff's position was that MPHB would be liable to contribute 70% of the cash portion, and would also be liable to fund the entire loan portion, at a rate of interest of 8%pa. In other words, MPHB (according to the plaintiff) was liable to contribute 91% of the total funding required by each JV company for the acquisition of the lands By contrast, MPHB asserted that funding for the JV companies was to have been provided in proportion to their agreed equity interests, ie on a 70:30 basis. The plaintiff alleged there were oppression of conduct which included: (a) the demand by MHPB that ISM contributes 30% of the purchase price for the De Vegas land that was acquired by Leisure Dotcom Sdn Bhd ; (b) the rights issues shares undertaken by Queensway Nominees (Asing) Sdn Bhd, Queesway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd; (c) the imposition of interest on the shareholder advances made by MPHB for the cash portion of the funding to the JV companies; (d) the refusal to re-elect Dato' Ray Cheah as a director of the five JV companies; and (e) the transfer of one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd and West-Jaya Sdn Bhd to Jayavest Sdn Bhd. The other issues were: (i) whether a quasi-partnership existed between the parties in respect of the JV companies; (ii) whether the terms of the oral joint venture agreement were valid; (iii) whether the plaintiff could sustain a claim for oppression on a purported breach of a shareholders' agreement; and (iv) whether the case for oppression was made out. The plaintiff further claimed that the directors of the JV companies who were nominated by MPHB had acted for an improper purpose and in breach of their fiduciary duty by suppressing documents or failing to provide adequate disclosure of information to ISM in connection with the rights issue. The plaintiff also

claimed for the general, exemplary and punitive damages. The defendant counterclaimed and sought for a declaration that the joint venture arrangement had been terminated by reason of ISM's breach of its obligations to contribute 30% of the total funding required by all five JV companies. It also further sought to recover interest on 30% of the Maybank loans and the opportunity costs on 70% of the interest paid to Maybank for the Maybank loans.

Held, allowing the plaintiff's claim in part and dismissing the defendant's counterclaims:

(1) The demand for 30% contribution at Leisure Dotcom Sdn Bhd amounted to oppression of ISM's rights as a shareholder at Leisure Dotcom on the basis that Leisure Dotcom Sdn Bhd was quasi-partnership, and hence it would not have been open to MPHB to unilaterally dictate to ISM how much it ought to contribute to the funding requirements of Leisure Dotcom Sdn Bhd. Even if the JV Companies were not quasi-partnerships, MPHB's insistence that ISM make a contribution of 30% of the purchase price was unfairly prejudicial to the interests of ISM qua shareholder in Leisure Dotcom Sdn Bhd, because it contravened the terms of the oral shareholders' agreement between them (see para 47).

(2) The rights issue exercises by Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd was unfairly prejudicial to the rights of ISM as a shareholder of these three JV companies because of the nature of the relationship of mutual trust and confidence between ISM and MPHB, it would not have been open to MPHB to carry out an exercise to increase the share capital of the JV companies by the rights issue without the assent and approval of ISM. Even assuming the JV companies in question were not quasi-partnerships, the rights issue exercises would have breached the terms of the oral agreement between ISM and MPHB that the shareholding proportions would be maintained at a 30:70 ratio (see para 47).

(3) The differing treatment of the cash advances by each shareholder amounted to unfair prejudice of the rights of ISM as a shareholder in all the JV companies. This conclusion was not predicated on either a finding that the JV companies were quasi-partnerships or *Ebrahimi*-type companies, or that the conduct complained of amounted to a breach of the terms of the oral joint venture agreement between them (see para 47).

(4) While the court accepted that parties to a joint venture do indeed owe fiduciary duties to each other, the scope of those duties were very much dependent on the particular nature of the fiduciary relationship in question. Just because a person was fiduciary did not mean, for example,

that he was accountable as though he were a trustee. The fiduciary duties imposed on a solicitor in a solicitor-client relationship would differ from the fiduciary obligations owed by a director to the company of which he or she is a director, even if there might be certain duties that would be common to both categories. The label fiduciary did not come with a standardised bundle of obligations that apply in all cases; the incidence and scope of the duties of a fiduciary would vary with each category of fiduciary, and the categories of fiduciaries were not closed. It could not be accepted that the mere fact that they have entered into a joint venture agreement meant that the relationship was a quasi-partnership (see paras 50–51 & 53).

(5) Even though it was agreed between the parties that an oral agreement existed, there was nonetheless material disputes between them as to what the terms of this oral agreement were. The terms of the oral agreement was material to the outcome of the case. The crux of a claim for oppression involves a determination of whether the conduct of the defendant had been commercially unfair or, put another way, there had been a visible departure from the standards of fair dealing or a violation of the conditions of fair play. The terms of the shareholders' agreement were relevant for the determination of whether there had been oppression of the rights of the plaintiff, although not all breaches of the terms of a shareholders' agreement would give rise to actionable oppression (see paras 75–76).

(6) There was nothing to prevent the court from finding that the relationship of mutual confidence arose because the parties considered themselves bound by the terms of an agreement between them. Where one party had conducted itself in breach of the agreement and where that breach was sufficient to amount to oppression or oppressive conduct, no reason why it could not form the basis for an action under s 181 of the Companies Act 1965. It was well settled that whether or not there was oppression, disregard, unfair discrimination or prejudice in any particular case must be determined from the facts of each case. The court was unable to accept a proposition of general application that a breach of an agreement between shareholders could never amount to actionable oppression under s 181 of the Companies Act 1965 (see paras 110 & 117).

(7) The contention of the breach of duty claimed by the plaintiff did not have any effect on the plaintiff's claim for damages or its prayer for an order that its shares to be bought out. Whether or not the directors had provided information that had been requested by the plaintiff would not have changed the outcome of the rights issue. It was not as though the plaintiff had been misled by the lack of information to vote in favour of the rights issue. Similarly, whether or not the information had been provided would not have changed the fact that MPHB would have voted

in favour of the rights issue. There was no causation between the remedies sought by the plaintiff in respect of the rights issue and the acts of the directors of the JV companies in refusing the information that had been sought by the plaintiff prior to the extraordinary general meetings approving the rights issuances by the JV companies. The claim to make the directors personally liable was dismissed (see paras 187–188).

(8) Although ample opportunity was given to counsel to advance submissions, none of the plaintiff's principal submissions, executive summary or submissions in reply addressed its claim for exemplary or punitive damages. In any event, the plaintiff had not proven circumstances that justify any award for exemplary or punitive damages. It was not established in evidence that the defendants had acted out of vindictiveness or malice, or whether they had simply acted out of a misapprehension of the true terms of the joint venture (see paras 189–190).

[Bahasa Malaysia summary

Plaintif, ISM Sdn Bhd pada mulanya mengemukakan lima saman pemula yang menuduh penindasan minoriti di bawah s 181 Akta Syarikat 1965. Oleh kerana beberapa isu yang dipertikaikan menjadi bukti terhadap terma yang dipertikaikan dalam perjanjian lisan pemegang saham, tindakan tersebut ditukar menjadi writ dan afidavit yang difailkan ditukar menjadi pliding. Plaintif memegang 30% saham dalam syarikat JV. Plaintif dimiliki oleh Dato' Ray Cheah dan isterinya, Datin Teoh. Mereka juga adalah pengarahnya. Dato' Ray Cheah adalah pelabur hartanah, perunding hartanah dan penilai berdaftar dengan pengalaman bertahun-tahun. Beliau adalah orang utama yang berurusan dengan defendan berkaitan dengan syarikat JV. Apabila Dato' Ray Cheah telah dilantik pada bulan Jun 2006 untuk membantu pemulihan projek terbengkalai yang terletak di persimpangan Jalan Imbi dan Jalan Sultan Ismail yang dipanggil Galeri CN. Hartanah tersebut berada di atas dua keping tanah, Lot 1282 dan 1283 ('tanah CN') Pemilik tanah CN adalah syarikat yang memperoleh kemudahan kredit dari anak syarikat yang dimiliki sepenuhnya oleh MPHB. Dato' Ray Cheah memberi keterangan bahawa beliau menganggap pembangunan yang ditinggalkan di tanah CN adalah terlalu kecil untuk dimajukan menjadi pembangunan komersial bercampur yang bernilai tinggi, tetapi, oleh kerana lokasi utama yang berpusat, ia dan lot bersebelahan dengannya boleh menjadi pembangunan komersial bersepadu berskala besar. Beliau merangka pelan di mana lot bersebelahan akan diambilalih dan dimajukan secara bersepadu, yang dirujuk di sini sebagai 'Projek Imbi'. Dato 'Cheah walau bagaimanapun telah dimaklumkan bahawa MPHB akan mengambilalih projek terbengkalai tersebut. Sebagai sebahagian daripada proses pembayaran hutang, tanah CN akhirnya dijual kepada MP Factors Sdn Bhd, anak syarikat yang dimiliki sepenuhnya oleh MPHB. Ianya adalah alasan bersama antara kedua pihak bahawa wujudnya suatu perjanjian antara MPHB

dan ISM mengenai usaha sama berkenaan dengan Projek Imbi. Ianya juga tidak dipertikaikan bahawa pihak-pihak bersetuju ISM akan memegang 30% ekuiti dalam mana-mana syarikat usaha sama yang diperbadankan untuk melaksanakan projek tersebut, sementara MPHB akan memegang baki 70%. Dato' Cheah memberi keterangan bahawa lima syarikat JV yang berbeza telah digunakan agar pengambilalihan tersebut dapat dilaksanakan dengan cara berhati-hati dan tanpa menyedarkan pemilik lot individu bahawa terdapat satu pembeli yang mencadangkan untuk menggabungkan lot tersebut menjadi satu pembangunan. Sekiranya maklumat tersebut tersebar kepada umum, keseluruhan projek mungkin berisiko dipampas oleeh pemilik perseorangan. Strategi tersebut dilaksanakan atas nasihat Dato 'Cheah. Sebahagian besar syarat-syarat usaha sama tersebut dipertikaikan antara kedua-dua pihak. Inti pati pertikaian merangkumi tanggungjawab setiap pihak dalam menyediakan dana kepada syarikat JV. Kedudukan plaintif adalah bahawa dana untuk syarikat JV dibahagikan kepada bahagian tunai dan bahagian pinjaman, yang pada nisbah 30:70. Untuk bahagian tunai, ISM bertanggungjawab menyumbang 30% (dengan kata lain, 30% daripada 30%, atau 9% daripada jumlah dana yang diperlukan untuk setiap Syarikat JV). Kedudukan plaintif adalah bahawa MPHB adalah bertanggungjawab menyumbang 70% bahagian tunai, dan juga bertanggungjawab untuk membiayai keseluruhan bahagian pinjaman, dengan kadar faedah 8% setahun. Dengan erti kata lain, MPHB (menurut plaintif) bertanggungjawab menyumbang 91% dari jumlah dana yang diperlukan oleh setiap syarikat JV untuk pengambilalihan tanah tersebut. Sebaliknya, MPHB menegaskan bahawa dana untuk syarikat-syarikat JV harus diberikan secara bernisbah berdasarkan kepentingan ekuiti yang telah dipersetujui, iaitu pada nisbah 70:30. Plaintif mendakwa terdapat penindasan berdasarkan tingkah laku yang merangkumi: (a) permintaan MHPB bahawa ISM menyumbang 30% dari harga belian untuk tanah De Vegas yang diambil alih oleh Leisure Dotcom Sdn Bhd; (b) saham hak terbitan yang dikeluarkan oleh Queensway Nominees (Asing) Sdn Bhd, Queesway Nominees (Tempatan) Sdn Bhd dan Mulpha Kluang Maritime Carriers Sdn Bhd; (c) pengenaan faedah ke atas pendahuluan pemegang saham yang dibuat oleh MPHB untuk bahagian tunai dana kepada syarikat JV; (d) keengganan untuk memilih semula Dato' Ray Cheah sebagai pengarah lima syarikat JV; dan (e) pemindahan satu saham dalam setiap Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd dan West-Jaya Sdn Bhd kepada Jayavest Sdn Bhd. Isu-isu lain adalah: (i) sama ada wujud perkongsian separa antara pihak-pihak berkenaan dengan syarikat JV; (ii) sama ada terma perjanjian lisan usahasama tersebit sah; (iii) sama ada plaintif dapat mempertahankan tuntutan penindasan atas dakwaan pelanggaran perjanjian pemegang saham; dan (iv) sama ada kes penindasan dibuktikan. Plaintif selanjutnya mendakwa bahawa pengarah syarikat JV yang telah dicalonkan oleh MPHB telah bertindak dengan maksud yang tidak sepatutnya dan melanggar tugas fidusiari mereka dengan menyembunyikan dokumen atau gagal memberikan pendedahan maklumat yang mencukupi kepada ISM berhubung dengan hak terbitan.

Plaintif juga menuntut ganti rugi am, teladan dan punitif. Defendan membuat tuntutan balas dan memohon suatu deklarasi bahawa perjanjian usaha sama tersebut telah ditamatkan kerana pelanggaran ISM pada tanggungjawabnya untuk menyumbang 30% daripada jumlah dana yang diperlukan oleh kesemua lima syarikat JV. Ia juga selanjutnya memohon untuk mendapatkan kembali faedah 30% pinjaman Maybank dan 70% kos melepas daripada faedah yang dibayar kepada Maybank untuk pinjaman Maybank.

Diputuskan, membenarkan sebahagian tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Permintaan terhadap sumbangan 30% di Leisure Dotcom Sdn Bhd adalah penindasan terhadap hak ISM sebagai pemegang saham di Leisure Dotcom atas dasar bahawa Leisure Dotcom Sdn Bhd adalah perkongsian separa, dan oleh itu tidak terbuka untuk MPHB untuk secara sepihak menentukan kepada ISM berapa banyak yang harus disumbangkan kepada keperluan dana Leisure Dotcom Sdn Bhd. Jika syarikat JV bukanlah perkongsian separa, desakan MPHB agar ISM memberikan sumbangan sebanyak 30% dari harga belian tersebut secara tidak adil memprejudiskan kepentingan pemegang saham ISM dalam Leisure Dotcom Sdn Bhd, kerana ia bertentangan dengan syarat perjanjian lisan pemegang saham antara mereka (lihat perenggan 47).

(2) Hak terbitan yang dikeluarkan oleh Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd dan Mulpha Kluang Maritime Carriers Sdn Bhd adalah secara tidak adil memprejudiskan hak ISM sebagai pemegang saham ketiga-tiga syarikat JV ini kerana sifat hubungan adalah saling mempercayai dan yakin antara ISM dan MPHB, ianya tidak akan terbuka bagi MPHB untuk meningkatkan modal saham syarikat JV melalui isu terbitan tanpa persetujuan dan kelulusan ISM. Jika dengan menganggap syarikat-syarikat JV yang dimaksudkan bukanlah perkongsian separa, pelaksanaan hak terbitan akan melanggar terma perjanjian lisan antara ISM dan MPHB bahawa nisbah pemegangan saham akan dikekalkan pada nisbah 30:70 (lihat perenggan 47)

(3) Perbezaan layanan pada pendahuluan tunai oleh setiap pemegang saham terjumlah kepada prejudis yang tidak adil terhadap hak ISM sebagai pemegang saham dalam kesemua syarikat JV. Kesimpulan ini tidak bersandarkan kepada dapatan bahawa syarikat-syarikat JV tersebut adalah perkongsian separa atau syarikat jenis *Ebrahimi*, atau bahawa tingkah laku yang diadukan adalah terjumlah kepada pelanggaran syarat-syarat perjanjian lisan usaha sama antara mereka (lihat perenggan 47).

(4) Meskipun mahkamah mengakui bahawa pihak-pihak dalam usaha sama sememangnya memiliki tugas fidusiari antara satu sama lain, skop

A tugas-tugas tersebut adalah tertakluk kepada sifat tertentu hubungan fidusiari tersebut. Hanya kerana seseorang tersebut adalah fidusiari tidak bermaksud, misalnya, bahawa beliau dipertanggungjawabkan seolah-olah beliau adalah pemegang amanah. Tugas fidusiari yang dikenakan ke atas peguam dalam hubungan peguamcara-anak guam adalah berbeza dengan tugas fidusiari oleh seorang pengarah kepada syarikat yang mana beliau adalah pengarah, walaupun mungkin terdapat tugas-tugas tertentu yang biasa bagi kedua-dua kategori. Label fidusiari tidak termasuk pada ikatan tugas biasa yang terpakai pada setiap kes; kejadian dan skop tugas fidusiari akan berbeza pada setiap kategori fidusiari, dan kategori fidusiari adalah tidak tertutup. Ianya tidak dapat diterima bahawa hanya fakta semata-mata bahawa mereka telah memasuki perjanjian usaha sama bermaksud hubungan tersebut adalah perkongsian separa (lihat perenggan 50–51 & 53).

D (5) Meskipun ianya telah dipersetujui antara pihak-pihak wujudnya perjanjian lisan, walaupun begitu terdapat pertikaian material antara mereka mengenai apakah terma perjanjian lisan ini. Terma perjanjian lisan tersebut penting bagi keputusan kes. Inti pati tuntutan penindasan melibatkan dapatan sama ada tingkah laku defendan secara komersial adalah tidak adil atau, dengan kata lain, terdapat penyimpangan yang nyata daripada standard urusan yang adil atau perlanggaran syarat dalam bersikap adil. Terma-terma perjanjian pemegang saham adalah wajar bagi menentukan sama ada terdapat penindasan terhadap hak-hak plaintif, walaupun tidak kesemua pelanggaran terma-terma perjanjian pemegang saham akan menimbulkan penindasan yang dapat dilaksanakan (lihat perenggan 75–76).

(6) Tidak ada apa yang menghalang mahkamah dalam mendapati bahawa hubungan saling percaya timbul kerana pihak-pihak menganggap diri mereka terikat pada terma-terma perjanjian antara mereka. Di mana satu pihak telah melakukan pelanggaran perjanjian dan di mana pelanggaran tersebut kepada penindasan atau perlakuan penindasan, tidak ada sebab mengapa ia tidak dapat menjadi asas bagi tindakan di bawah s 181 Akta Syarikat 1965. Ia adalah jelas bahawa sama ada terdapat penindasan, pengabaian, diskriminasi yang tidak adil atau prejudis atau tidak dalam kes tertentu haruslah ditentukan pada fakta setiap kes. Mahkamah tidak dapat menerima cadangan permohonan umum bahawa pelanggaran perjanjian antara pemegang saham tidak pernah boleh terjumah sebagai penindasan yang dapat dilaksanakan di bawah s 181 Akta Syarikat 1965 (lihat perenggan 110 & 117).

(7) Penghujahan mengenai pelanggaran tanggungjawab yang didakwa oleh plaintif tidak memberikan sebarang kesan terhadap tuntutan ganti rugi plaintif atau permohonan untuk suatu perintah agar sahamnya dapat dibeli. Sama ada pengarah telah memberikan maklumat yang telah

diminta oleh plaintif tidak akan mengubah keputusan pada hak terbitan tersebut. Ianya bukanlah seolah-olah plaintif telah disalah arah dek kekurangan maklumat dalam mengundi bagi hak terbitan. Begitu juga, sama ada maklumat yang diberikan tidak akan mengubah fakta bahawa MPHB akan mengundi bagi hak terbitan. Tidak ada kausa antara remedi yang dipohon oleh plaintif berkenaan dengan hak terbitan dan tindakan pengarah syarikat JV dalam memberikan maklumat yang telah diminta oleh plaintif sebelum mesyuarat agung luar biasa yang meluluskan hak terbitan oleh syarikat JV. Tuntutan untuk mendakwa pengarah bertanggungjawab secara peribadi ditolak (lihat perenggan 187–188).

(8) Meskipun banyak peluang telah diberikan kepada peguamcara untuk mengajukan penghujahan, tidak ada sebarang penghujahan utama oleh plaintif, ringkasan eksekutif atau penghujahan balas menyatakan tuntutan terhadap ganti rugi teladan atau punitif. Dalam pada itu, plaintif tidak membuktikan keadaan yang membenarkan pemberian ganti rugi teladan dan punitif. Itu tidak dapat dibuktikan dalam keterangan bahawa defendan telah bertindak atas dendam dan niat jahat, atau sama ada mereka hanya bertindak kerana salah faham mengenai terma sebenar usaha sama tersebut (lihat perenggan 189–190).]

Cases referred to

Beh Chun Chuan v Paloh Medical Centre [1999] 3 MLJ 262; [1999] 3 AMR 3352; [1999] 7 CLJ 1; [1999] 2 MLRH 840, HC (refd)

Brett v Migration Solutions Holdings Ltd and others [2016] EWHC 523 Ch, HC (refd)

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Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227; [1978] 1 MLRA 235, PC (refd)

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Tuan Haji Ishak bin Ismail v Leong Hup [1996] 1 MLJ 661; [1996] 1 AMR 300; [1996] 1 CLJ 393; [1995] 2 MLRA 198, CA (refd)
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Yai Yen Hon v Lim Mong Sam [1997] 2 MLJ 190; [1997] 2 AMR 1742; [1997] 2 CLJ 812; [1997] 1 MLRA 152, CA (refd)
Zen Courts v Bukit Jalil Development (No 5) [2019] MLJU 1308; [2019] AMEJ 1415; [2019] 1 LNS 1735; [2019] MLRHU 1296, HC (folld)

Legislation referred to

Companies Act 1965 ss 176, 181, 181(1)(a), (1)(b), (2), 218(1)(i)
Companies Act 2016 ss 346, 465(1)(h)
Companies (Northern Island) Order 1986 [UK]
Companies Act [SG] s 216

Editorial note: The defendants in this case appealed to the Court of Appeal, Civil Appeal No W-02(NCC)(W)-1220-07 of 2019 was allowed with costs and the High Court decision dated 21 September 2019 was set aside. Please also refer to *Queensway Nominees (Asing) Sdn Bhd & Ors v ISM Sendirian Bhd* [2024] MLJU 2985.

Terence Chan (Tobias Lim and Bryan Goh with him) (Lim Kian Leong & Co) for the plaintiff.
Celine Chelladurai (Saritha Devi Kirupalani and Nur Ainnabila Rosli with her) (Zaid Ibrahim & Co) for the defendant.

Azizul Azmi Adnan J:

INTRODUCTION

[1] The plaintiff, ISM Sdn Bhd ('ISM') initially filed five originating summons in this case, alleging minority oppression under s 181 of the Companies Act 1965. However, as some of the issues in dispute turned on proof of the disputed terms of an oral shareholders' agreement, the suit was converted to a writ, and the affidavits filed were converted into pleadings.

[2] The five cases were heard together. After a trial of the actions, I directed that the plaintiff's minority stake in Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd, West-Jaya Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd and Leisure Dotcom Sdn Bhd ('JV companies') be bought out by the majority shareholder, MPHB Capital Bhd.

[3] The reasons for my decision are recorded here.

MATERIAL BACKGROUND FACTS

Parties

[4] ISM held 30% of the shares in the JV companies. ISM is owned by Dato' Ray Cheah and his wife, Datin Teoh. They are also its directors.

[5] Dato' Ray Cheah is a property investor, property consultant and registered valuer with a considerable number of years' experience. He was the principal person dealing with the defendants in connection with the JV companies.

[6] The 70% majority shares in the Mulpha Kluang Maritime Carriers Sdn Bhd was held by Multi-Purpose Shipping Corp Bhd, a wholly-owned subsidiary of MHPB Capital Bhd. The majority shares in the other JV companies were held directly by MPHB Capital Bhd. Prior to 2013, the majority shares in the JV companies were held by a predecessor entity, Multi-Purpose Holdings Bhd. Multi-Purpose Holdings Bhd underwent a demerger exercise, by which its non-gaming businesses were transferred to MPHB Capital Bhd. For the purposes of this judgment, references to 'MPHB' should be construed as referring to Multi-Purpose Holdings Bhd before the demerger, and to MPHB Capital Bhd after the demerger. MPHB Capital Bhd is a publicly listed company.

[7] The other defendants in the cases before me were directors of the JV companies who were nominees of MPHB. Tan Sri Surin Upatkoon is the managing director of MPHB and also its single largest shareholder. Madam Kheoh And Yeang is the chief operating officer of MPHB. Ms Ivevei Upatkoon is an executive director of MPHB and the daughter of Tan Sri Surin Upatkoon. Datuk Vijeyaratnam, who is a director of three of the JV companies, is also an non-executive director of Magnum Bhd, a publicly listed gaming company of which Tan Sri Surin is chairman.

The CN lands

[8] The story began when Dato' Ray Cheah was approached in June 2006 to assist in the rehabilitation of an abandoned project located on the junction of Jalan Imbi and Jalan Sultan Ismail called CN Gallery. The property sat on two pieces of land, Lots 1282 and 1283 ('the CN lands').

[9] The proprietor of the CN lands was a company that had obtained credit facilities from a wholly-owned subsidiary of MPHB.

[10] At trial, Dato' Ray Cheah testified that he considered the abandoned development on the CN lands was too small to be developed into a mixed-use commercial development of significant value, but that, because of its prime central location, it and the lots adjoining them could be turned into a large-scale integrated commercial development. He conceived a plan by which the adjoining lots could be acquired and developed on an integrated basis, referred to here as the 'Imbi Project'.

[11] According to his testimony received at trial, Dato' Cheah conducted extensive research over a period of almost one year, which included investigating the titles of the adjoining lands, looking into DBKL urban planning provisions and making discreet inquiries regarding ownership of the adjacent lots.

[12] Discussions first commenced between Dato' Cheah and Madam Kheoh in March 2007 regarding the possibility of MHPB selling its interests in the CN lands. Dato' Cheah was however informed that MPHB was about to acquire the abandoned project. As part of the debt repayment process, the CN lands were eventually sold to MP Factors Sdn Bhd, a wholly-owned subsidiary of MPHB.

The joint venture

[13] At the time, MPHB's core businesses were gaming, stockbroking and financial services. It had little experience in property investment or development. Nor did it have any concrete plans for the CN lands.

[14] Dato' Cheah decided to approach MPHB as one of the possible parties to implement the Imbi Project. He knew that MPHB had significant cash resources to fund such a project. When he outlined his concept for the Imbi Project to Madam Kheoh, she told him that 'it would have been impossible for any party to acquire all the lots' for the Imbi Project.

[15] Despite her apparent initial misgivings, Madam Kheoh became quite interested in the project. Dato' Cheah presented a feasibility study to Tan Sri Surin Upatkoon and Madam Kheoh, following which MPHB agreed to participate in the Imbi Project.

[16] It was common ground between the parties that there existed an agreement between MPHB and ISM regarding the joint venture undertaken for the Imbi Project. It was also not in dispute that the parties agreed that ISM would hold 30% of the equity in any joint venture company incorporated to undertake the project, while MPHB would hold the remaining 70%.

[17] Dato' Cheah testified that five different JV companies had been used in order that the acquisitions be carried out in a discreet manner and without alerting the owners of the individual lots that there was a single purchaser that was proposing to amalgamate the lots into a single development. If that information had gone into the public domain, the whole project may run the risk of being held to ransom by a single owner. This strategy was undertaken upon Dato' Cheah's advice.

[18] Much of the remainder of the terms of the joint venture was in dispute between the parties. The core of the dispute surrounded the obligations of the respective parties to provide funding to the JV companies. The plaintiff's position was that the funding for the JV companies was to be divided into a cash portion and a loan portion, apportioned on a 30:70 basis. Of the cash portion, ISM would be liable to contribute 30% (in other words, 30% of 30%, or 9% of the total funds required in respect of each JV company). The plaintiff's position was that MPHB would be liable to contribute 70% of the cash portion, and would also be liable to fund the entire loan portion, at a rate of interest of 8%pa. In other words, MPHB (according to the plaintiff) was liable to contribute 91% of the total funding required by each JV company for the acquisition of the lands.

[19] By contrast, MPHB asserted that funding for the JV companies was to have been provided in proportion to their agreed equity interests, ie on a 70:30 basis.

The land acquisitions

[20] A number of different properties were acquired over the course of several years in pursuit of the Imbi Project. They were as follows:

> (a) the CN lands. As mentioned earlier, MPHB made the decision to acquire the CN lands. However, the acquisition turned out to be fraught with complication;

The abandoned development on the CN lands was not only encumbered, but several hundred units had also been sold to end-purchasers. In addition, there were unpaid contractors, suppliers and consultants baying at the door.

Dato' Cheah testified that he was informed by Madam Kheoh that MPHB's involvement in the Imbi Project was conditional MPHB's successful acquisition of the CN lands. According to him, he then brought in a team of lawyers and other professional advisors who were able to resolve the problem by way of a scheme of arrangement under s 176 of the Companies Act 1965. The CN lands were transferred to MP Factor Sdn Bhd on 24 June 2008;

(b) *Lot 646*: ISM agreed to acquire, on behalf of the joint venture, Lot 646 from the Ti family on 9 April 2007 for RM2.75m. The sale and purchase agreement was signed by Queensway Nominees (Asing) Sdn Bhd about a month later;

(c) *Lot 1216*: Later in April 2007, ISM persuaded the proprietor of Lot 1216 to sell its land together with two leases on adjoining lands. Lot 1216 is located on the south-west corner of the Jalan Imbi-Jalan Sultan Ismail intersection. The parties referred to this land as the 'De Vegas Land' because the De Vegas club was located on this land;

A formal sale and purchase agreement was entered into between Leisure Dotcom Sdn Bhd and the vendor some two months later. The parties to the sale and purchase fell into dispute, with the vendor alleging that the agreement had been terminated. This prompted Leisure Dotcom Sdn Bhd to sue for specific performance. On 25 June 2014 (more than seven years after the initial contract was signed), the Court of Appeal granted judgment in favour of Leisure Dotcom Sdn Bhd. Leave to appeal to the Federal Court was refused.

(d) *Lot 642*: In May 2007, Dato' Cheah, through his company Bluesky Pavilion Sdn Bhd, entered into an agreement with the Theo family to purchase Lot 642 for RM2.95m. A formal sale and purchase agreement was signed by Queensway Nominees (Tempatan) Sdn Bhd on 25 June 2007;

(e) *Lot 200*: On 25 May 2007, ISM entered into an contract on behalf of the joint venture to purchase Lot 200 from the Tan family for over RM65m. Formal purchase documentation was signed by Queensway Nominees (Asing) Sdn Bhd on 26 July 2007;

(f) *Lot 1286*: Beginning May 2007, ISM commenced negotiations to acquire Lot 1286 from one Madam June Liao. However, she was not willing to sell the land at the time, following which the joint

venture, on the advice of Dato' Cheah, took up a two-year tenancy over the land to ward off competing purchasers. ISM then continued its efforts to persuade Madam Liao to sell Lot 1286. Finally, some five years after the initial approach, she relented;

At some point, she began to have second thoughts, and the joint venture feared that litigation was imminent. The contract note for the purchase had been signed Dato' Ray Cheah. Because the entity designated to be the purchaser of the land was Caribbean Gateway Sdn Bhd, a company wholly-owned by MPHB, MPHB and ISM decided that Dato' Cheah ought to be made a director and shareholder of Caribbean Gateway Sdn Bhd. One share was transferred to Dato' Cheah for this purpose. Madam Liao eventually agreed to sell at RM30.23m. ISM did not participate in this acquisition due to financial constraints (in other words, Caribbean Gateway remained an entity that was virtually wholly-owned by MPHB, and ISM did not own any shares in it).

(g) *Lot 637*: In June 2007, Dato' Ray Cheah used his company Optimum Gold Sdn Bhd to enter into a contract to purchase Lot 637 for RM3.98m. A formal sale and purchase agreement was signed on 10 July 2007, and the land was transferred to West-Jaya Sdn Bhd at completion;

(h) *Lot 643*: In mid-2009, Dato' Ray commenced negotiations to acquire Lot 643. Initially, he was only successful in procuring the purchase of a 12/13ths undivided share of the land from the Chai family. It was not until October 2011, more than two years after the initial approach, that ISM procured the remaining 1/13th share of Lot 643. The land was transferred to and held by Mulpha Kluang Maritime Carriers Sdn Bhd;

(i) *Lot 644*: The sale and purchase agreement for Lot 644 was signed in October 2009, following negotiations that were commenced by ISM. This land is also held by Mulpha Kluang Maritime Carriers Sdn Bhd;

(j) *Lot 1199*: Located on Lot 1199 were flats owned by ten different proprietors. ISM commenced negotiations to acquire Lot 1199 in early 2008 with these proprietors. It was not until more than two years later that all the flats were acquired, with the last sale and purchase agreement being signed in November 2010. Lot 1199 was transferred to Mulpha Kluang Maritime Carriers Sdn Bhd; and

(k) *Lot 634*: Lot 634 was acquired in August 2011, after protracted negotiations by ISM. MPHB acquired this property through Caribbean Gateway Sdn Bhd.

[21] In all, eleven separate plots of land were acquired, two of which were held by entities outside the joint venture, Caribbean Gateway and MP Factor Sdn Bhd. It was clear that the involvement of ISM was key and central to the acquisition of the Imbi lands, even in instances where the land acquired was eventually held by companies wholly-owned by MPHB. It was also clear that the work involved in accumulating the lands was not insubstantial; much effort and perhaps some guile were required over the course of several years in order to acquire the various plots.

Caribbean Gateway Sdn Bhd and the Maybank loans

[22] In the meantime, beginning sometime in 2009, the parties had been exploring plans for the development of the Imbi Project. Consultants were engaged. Reports were prepared. One of the proposals entailed the use of Caribbean Gateway Sdn Bhd as the entity to hold all the lands held by Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and West-Jaya Sdn Bhd (the acquisitions by the other JV companies had not yet completed at this time). It was also contemplated that Caribbean Gateway Sdn Bhd would obtain external financing in the form of bank loans in order to finance the acquisition of the lands.

[23] Even though this corporate exercise did not materialise, Caribbean Gateway nonetheless proceeded to obtain, and to draw down upon, four loans from Malayan Banking Bhd. Although the stated purpose of the loans was to finance the acquisition of the lands held by the relevant JV companies at that time, Caribbean Gateway never in fact acquired the lands from the JV companies. Instead, the proceeds of the Maybank loans were on-lent to the JV companies, which then used the proceeds to repay the shareholder advances made to the JV companies by MPHB.

The draft shareholders' agreement

[24] The parties sought to formalise their relationship by negotiating a shareholders' agreement. A draft shareholders' agreement was circulated by MPHB to ISM on 24 July 2009. This draft was prepared on the basis of the corporate proposal involving Caribbean Gateway Sdn Bhd as the joint venture entity, which was to acquire the separate lots of land from each JV company. As we have seen, this proposal never eventuated.

[25] The plaintiff did not raise any major objections to the terms of this first draft shareholders' agreement. In fact, in the course of trial, Dato' Ray Cheah conceded that he considered the plaintiff to be bound by the terms of the first draft shareholders' agreement, save for cl 12.4 (which provided that the shareholders' agreement did not constitute a partnership between the parties).

It was only come eight months later, in March 2010, that Dato' Cheah provided a response to the first draft shareholders' agreement. He did so by proposing an entirely new draft shareholders' agreement, rather than providing comments to the original draft provided by MPHB. No formal shareholders' agreement was ever executed between the parties.

[26] Despite the fact that there was no formal shareholders' agreement entered into between ISM and MPHB, it was the common position of the parties that they were bound by the terms of an oral agreement between them. The precise terms of this oral agreement was a matter of some dispute.

The allegations of oppression

[27] Learned counsel for the plaintiff advanced 25 separate instances of oppressive conduct. I did not consider it necessary to address each and every one of them in this judgment. The allegations of oppressive conduct were substantially centred upon circumstances that may usefully be grouped into five broad areas:

> (a) the demand by MHPB that ISM contributes 30% of the purchase price for the De Vegas land that was acquired by Leisure Dotcom Sdn Bhd;
>
> As explained at para 20(c) ante, Leisure Dotcom Sdn Bhd entered into a sale and purchase agreement to acquire the De Vegas land, but it and the vendor fell into dispute, as a result of which Leisure Dotcom Sdn Bhd sued the vendor for specific performance;
>
> Leisure Dotcom Sdn Bhd eventually prevailed at the Court of Appeal in June 2014. On the very same day, MPHB requested that ISM contributes 30% of the outstanding purchase price for the De Vegas land;
>
> The plaintiff considered that this request for contribution of 30% of the purchase price was not in accordance with the practice of the joint venture previously, where the plaintiff was required to contribute 30% of the cash portion, or 9% of the total acquisition cost of each property acquired under the joint venture. It was alleged the insistence by MPHB that ISM contributes 30% to the total funding requirement for Leisure Dotcom Sdn Bhd amounted to actionable oppression and unfair prejudice under s 181 of the Companies Act 1965;
>
> (b) the rights issues shares undertaken by Queensway Nominees (Asing) Sdn Bhd, Queesway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd;
>
> MPHB had caused each of Queensway Nominees (Asing) Sdn

Bhd, Queensway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd to undertake a rights issue exercise. In the case of Mulpha Kuang, MPHB's interests were held through Multi-Purpose Shipping Corp Bhd, a wholly-owned subsidiary of MPHB. These rights issue exercises had the effect of diluting ISM's holdings in the three JV companies from 30% to fractions of one percent;

In each case, the rights issue did not raise any fresh capital for the relevant JV company, but was effected by way of capitalisation of intercompany debt. The plaintiff did not take up its entitlements under the rights issue exercises by the relevant JV companies. The plaintiff's position was that it did not have the resources to do so;

It was advanced for the plaintiff that, among others, these rights issue exercises, and the manner in which they had been carried out constituted oppression of the plaintiff's rights as a shareholder in the relevant JV companies and were in disregard of such rights;

In the case of West-Jaya Sdn Bhd, even though a rights issue was proposed, the resolution was not carried, as its articles of association required a special resolution to be passed. Because ISM held 30% of the ordinary shares, a special resolution could not have been passed without its concurrence;

(c) the imposition of interest on the shareholder advances made by MPHB for the cash portion of the funding to the JV companies;

As explained at para 18, the plaintiff contended that the terms of the agreement between the parties was that the funding for the JV companies was to be divided into a cash portion and a loan portion, apportioned on a 30:70 basis. Of the cash portion, ISM would be liable to contribute 30% (in other words, 30% of 30%, or 9% of the total funds required in respect of each JV company). The plaintiff's position was that MPHB would be liable to contribute 70% of the cash portion, and would also be liable to fund the entire loan portion, at a rate of interest of 8%pa. In other words, MPHB (according to the plaintiff) was liable to contribute 91% of the total funding required by each JV company for the acquisition of the lands;

The plaintiff's position was that the cash portion was not to bear interest. It was, in other words, to be treated as quasi-equity. The defendants, for their part, denied that this was the case, citing the fact that the listing requirements of Bursa Malaysia and the relevant transfer pricing guidelines would have prevented MPHB from lending to a subsidiary or related company without charging interest;

From 2007, no interest was charged on the cash portion advanced by both shareholders to Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and West-Jaya Sdn Bhd. Interest was paid rateably to both shareholders in respect of the cash portion advanced to Leisure Dotcom Sdn Bhd. However, from 2010 onwards, MPHB caused the JV companies to pay interest to itself on the cash portion of the advances made by MPHB, but not the cash portion advanced by the ISM;

Among the contentions put forward by the plaintiff was that the differing treatment regarding interest on the cash portion advanced by the respective shareholders justified a finding of oppression of the rights of ISM as shareholder in all of the JV companies and of unfair discrimination against it;

(d) the refusal to re-elect Dato' Ray Cheah as a director of the five JV companies;

Dato' Cheah was not initially a director of any of the JV companies. ISM was represented on the board of Queensway Nominees (Asing) Sdn Bhd and Queensway Nominees (Tempatan) Sdn Bhd by Dato' Cheah's wife, Datin Teoh, whereas it had no representative on the boards of the other JV companies. After the parties fell into dispute, Dato' Cheah obtained a seat on the board of all the JV companies, after he had made such a request following receipt of the notices for the extraordinary general meetings where the rights issue were to be considered and voted upon;

Dato' Cheah made a request for the financial records and supporting documents of the JV companies, in his capacity as director of the companies. On 15 June 2015, the financial documents of the JV companies were made available to him, but without supporting documents. Just two days later, the annual general meetings of the JV companies were held where Dato' Ray Cheah was not re-elected as a director. On the very next day, 18 June 2015, the company secretary to the JV companies informed ISM that, because Dato' Cheah was no longer a director of the companies, the corporate records would not be made available for his inspection;

It was contended by the plaintiff that the refusal by the directors of the JV companies to re-elect Dato' Cheah as a director of the JV companies amounted to oppression of its rights as a shareholder;

(e) the transfer of one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd and West-Jaya Sdn Bhd to Jayavest Sdn Bhd;

In October and November 2014, MPHB had transferred one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd and West-Jaya Sdn Bhd to its subsidiary company, Jayavest Sdn Bhd. This was after the dispute regarding Leisure Dotcom Sdn Bhd had arisen, but before the rights issue exercises were undertaken;

At trial, a witness for MPHB conceded that the reason for the introduction of Jayavest Sdn Bhd as a shareholder was to ensure that the general meetings of the relevant JV companies would not fail for want of quorum, in the event that ISM did not attend any such meeting called;

It was contended that the transfer of such shares constituted oppression of ISM's rights as shareholder in the relevant JV companies.

The counterclaims

[28] MPHB counterclaimed against ISM in all five suits. It sought for a declaration that the joint venture arrangement had been terminated by reason of ISM's breach of its obligations to contribute 30% of the total funding required by all five JV companies. It also sought to recover interest on 30% of the Maybank loans and the opportunity costs on 70% of the interest paid to Maybank for the Maybank loans.

Decision

[29] I was of the view that the plaintiff's claims of oppression, unfair prejudice and disregard of interests on the first three of the five grounds set out above have been made out, and directed, among others, that MPHB buys out ISM's shares in the JV companies at fair value. All the orders that were granted by the court are set out at para 205 post.

[30] The counterclaim in each case was dismissed.

[31] The reasons for my decision are explained in the following paragraphs.

ANALYSIS

General principles

[32] The present action was premised upon s 181 of the Companies Act 1965, sub-ss (1) and (2) of which provided as follows:

Section 181 Remedy in cases of an oppression

(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

[33] The general principle for the governance of companies is majority rule. This principle is, unsurprisingly, subject to established exceptions: for example, parties are free to modify the operation of the principle of majority rule by contract. Hence, not infrequently, shareholders' agreements will provide for 'reserved matters' that may only be approved with unanimity or by supermajority assent. Another example is s 181, which is a statutory intrusion into the principle of majority rule. The law recognises that, in certain circumstances, the powers of a company may be exercised in manner that is commercially unfair to a party who does not wield control over the fate and direction of the company, most usually a minority shareholder. In such cases, the law provides for wide powers of the court to provide relief to the oppressed.

[34] Thus, if the affairs of a company or the powers of its directors are being exercised in an oppressive manner or in disregard of the interests of a member

A or debenture holder, or an act has taken place or is threatened that unfairly discriminates against or prejudices a member or debenture holder, the jurisdiction of the court to grant its wide-ranging relief under s 181(2) would be triggered.

B **[35]** In order to establish a case under s 181, a complainant must prove oppression, disregard or unfair discrimination or prejudice. There must exist commercial unfairness, or in the words of Lord Wilberforce in (*Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227; [1978] 1 MLRA 235) — a visible departure from the C standards of fair dealing and a violation of the conditions of fair play — before a case can be made.

[36] The difference between s 181(1)(a) and (1)(b) is that the former is D concerned not with particular acts but the manner in which the affairs of a company are being conducted generally, whereas the latter relates to specifically identifiable acts, whether actual or threatened. Despite the use of the present tense in s 181(1)(a) — 'are being conducted' and 'are being exercised' — it is open to the court to find that oppression exists if past conduct suggests that a E tendency or propensity to oppress or discriminate exists at the time of the proceedings (at p 229F, per Lord Wilberforce). A case for oppression can be made even if it emanates from a single act or omission, for as long as the *effects* of that single act or omission are such that they persist at the date of the suit (per Gopal Sri Ram JCA in *Owen Sim Liang Khui v Piasau Jaya* [1996] 1 MLJ F 113; [1996] 2 AMR 2477; [1996] 4 CLJ 716; [1995] 2 MLRA 461).

[37] Whether or not there was oppression, disregard, unfair discrimination or prejudice in any particular case must be determined from the facts of each G case (at p 129 (MLJ); 737i (CLJ)). Accordingly, a particular act in the context of one case may be held not to be oppressive conduct, but that same act in the circumstances of a different case may well be. In this regard, caselaw would be useful for the principles that were considered and applied, but the decision in each case must be arrived at based on the particular facts of that case.

H

[38] The test for unfairness is an objective one. The court must determine whether reasonable directors possessing the skills, knowledge, acumen and experience of the directors would have decided that a proposed course of action was unfair (*Jaya Medical Consultants v Island & Peninsular* [1994] 1 MLJ 520 I at p 536G; [1994] 1 AMR 381; [1993] 5 MLRH 440). That the directors may acted honestly in the best interest of the company is not sufficient to exculpate them; the court must still apply the reasonable director test to ascertain the fairness of the conduct (*Wind Ridge Farms Ltd v Quadra Group Investments Ltd* [1999] SJ No 602; 178 DLR (4th) 603).

[39] The rights of a member or debenture holder under s 181 accrues to that member or debenture holder personally. It is not a right exercisable by a member on behalf of the company of which he is a member. As such, where the conduct complained of is unlawful or amounts to a breach of a duty owed to the company, a member may only seek to invoke s 181 where that unlawfulness or breach of duty also causes oppression of, unfair discrimination against, or prejudice to, the member. Without the element of unfairness, the breach of a duty that is owed to the company is only actionable by a member through the derivative action procedure.

[40] In an ordinary case, commercial fairness is judged against the contractual terms upon which the shareholders have agreed to govern their relationship as it relates to the company (per Hoffmann LJ in *Re Saul D Harrison & Sons* [1994] BCC 475), which would mean the articles of association and — in my judgment — any shareholders' or joint venture agreement entered into between them (this is discussed further at para 91 et seq, post), whether or not the company is a party to such agreement.

[41] But there are also cases in which the personal nature of the relationship between the shareholders enables the court to subject the exercise of legal rights to equitable considerations, to prevent, for example, a party from insisting on its strict legal rights, or to permit such rights to only be exercised in a particular way.

[42] In *Re Saul D Harisson & Sons* ([1994] BCC 475), the Court of Appeal explained:

> Thus the personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting. I have in the past ventured to borrow from public law the term 'legitimate expectation' to describe the correlative 'right' in the shareholder to which such a relationship may give rise. It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form, such as an assumption that each of the parties who has ventured his capital will also participate in the management of the company and receive the return on his investment in the form of salary rather than dividend. These relationships need not always take the form of implied agreements with the shareholder concerned; they could enure for the benefit of a third party such as a joint venturer's widow.

[43] A company within this category is said to be a quasi-partnership, or an *Ebrahimi*-type company, after the leading House of Lords decision dealing with the winding up of a company under just and equitable grounds.

Summary of the findings in this case

[44] I found that the relationship between ISM on the one hand and MPHB on the other in relation their joint venture in each of the JV companies was one that was based on mutual trust and confidence that justified the imposition of equitable principles — the JV companies were, in other words, quasi-partnerships or *Ebrahimi*-type companies. The reasons for my having arrived at this conclusion is explained at paras 49–72.

[45] It was common ground between the parties that there existed an oral shareholders' agreement between ISM on the one hand and MPHB on the other. I found that part of the terms of this oral agreement between them were that:

(a) the equity in the JV companies was to be held on a ratio of 30:70, with 30% to be held by ISM and 70% by MPHB;

(b) the funding for the JV companies was to be divided into a cash portion and a loan portion, apportioned on a 30:70 basis. Of the cash portion, ISM would be liable to contribute 30% (in other words, 30% of 30%, or 9% of the total funds required in respect of each JV company). MPHB would be liable to contribute 70% of the cash portion, and would also be liable to fund the entire loan portion, at a rate of interest of 8%pa; and

(c) all decisions regarding the JV companies were to have been made on a consensus basis.

[46] My detailed analyses and findings regarding the terms of the shareholders' agreement are set out at paras 74–92.

[47] As regards the contention of oppression, I was of the view that:

(a) the demand for 30% contribution at Leisure Dotcom Sdn Bhd amounted to oppression of ISM's rights as a shareholder at Leisure Dotcom:

(i) on the basis that Leisure Dotcom Sdn Bhd was quasi-partnership, and hence it would not have been open to MPHB to unilaterally dictate to ISM how much it ought to contribute to the funding requirements of Leisure Dotcom Sdn Bhd; and

(ii) even if the JV companies were not quasi-partnerships, MPHB's insistence that ISM make a contribution of 30% of the purchase price was unfairly prejudicial to the interests of ISM qua shareholder in Leisure Dotcom Sdn Bhd, because it contravened the terms of the oral shareholders' agreement between them.

(b) the rights issue exercises by Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd was unfairly prejudicial to the rights of ISM

as a shareholder of these three JV companies, for the following reasons:

(i) because of the nature of the relationship of mutual trust and confidence between ISM and MPHB, it would not have been open to MPHB to carry out an exercise to increase the share capital of the JV companies by the rights issue without the assent and approval of ISM;

(ii) even assuming the JV companies in question were not quasi-partnerships, the rights issue exercises would have breached the terms of the oral agreement between ISM and MPHB that the shareholding proportions would be maintained at a 30:70 ratio;

(c) the differing treatment of the cash advances by each shareholder amounted to unfair prejudice of the rights of ISM as a shareholder in all the JV companies. This conclusion was not predicated on either a finding that the JV companies were quasi-partnerships or *Ebrahimi*-type companies, or that the conduct complained of amounted to a breach of the terms of the oral joint venture agreement between them.

[48] The discussion on the allegations of oppression is set out in paras 131–184.

Whether a quasi-partnership existed between the parties in respect of the JV companies

[49] Learned counsel for the plaintiff submitted that, because there existed a joint venture agreement between ISM and the MPHB, they owed fiduciary duties to one another and as a consequence the relationship between the parties was a quasi-partnership in relation to each of the JV companies. Reliance was placed on cases such as *Newacres v Sri Alam (No 1)* [1991] 3 MLJ 474; [1991] 3 CLJ 2781; [1991] 1 MLRA 163, for the proposition that joint-venturers owed one another fiduciary duties.

[50] While I accept that parties to a joint venture do indeed owe fiduciary duties to each other, the scope of those duties are very much dependent on the particular nature of the fiduciary relationship in question. Just because a person is a fiduciary does not mean, for example, that he is accountable as though he were a trustee. This was explicitly recognised by the Supreme Court in *Newacres v Sri Alam (No 1)* when it stated:

> We would, with respect, accept this proposition which goes to show that if the agreement of 2 October 1980 entered into by the litigating parties is indeed a joint venture agreement then their relationship is a fiduciary one. The question of the extent of the fiduciary obligations in this case, therefore, cannot be determined by submissions alone before us but must be ascertained from oral evidence as well as

minute scrutiny of the relevant documents. The subject matter raised in paras. (v) and (vi) relating to the breach of fiduciary duties must, of necessity, be so determined. We would on this point quote Jenkins CJ in *Tufton v Sperni* [1952] 2 TLR 516 at p 530:

> It must be shown that the transaction in question did in fact arise out of some special relationship between the parties and that the relationship was a fiduciary one. Moreover, it must be shown not merely that there was a fiduciary relationship of some sort, but that the fiduciary relationship was of such a character as to warrant the interference of the Court. (*In re Coomber* [1911] 1 Ch 723).

[51] With respect, learned counsel for the plaintiff has overlooked the basic principle that the scope of the duties undertaken by a fiduciary will depend on the precise nature of the relationship between the fiduciary and the principal. Thus, the fiduciary duties imposed on a solicitor in a solicitor-client relationship will differ from the fiduciary obligations owed by a director to the company of which he or she is a director, even if there may be certain duties that would be common to both categories. The label 'fiduciary' does not come with a standardised bundle of obligations that apply in all cases; the incidence and scope of the duties of a fiduciary will vary with each category of fiduciary, and the categories of fiduciaries are not closed.

[52] It will only be necessary to recall the words of Gopal Sri Ram JCA in *Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265; [1996] 2 AMR 2633; [1997] 2 CLJ 607; [1996] 2 MLRA 563:

> Because of the way in which the jurisprudence on the subject has developed, it is unsurprising to find that Parliament and judges have declined to define a fiduciary relationship and thereby to demarcate its parameters. In the case of the legislature, the nearest attempt to a definition of the relationship is to be found in s 2 of the Specific Relief Act 1950, which defines 'trust' and 'trustee' as follows:
>
> > 'trust' includes every species of express, implied, or constructive fiduciary ownership;
> >
> > 'trustee' includes every person holding, expressly, by implication or constructively, a fiduciary character.
>
> Judicial restraint in attempting a definition is exemplified by the following remark of Frankfurter J in *Securities & Exchange Commission v Chenery Corp* (1943) 318 US 80 at p 85:
>
> > To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?
>
> The flexible approach adopted by the courts when according recognition to a particular relationship as being fiduciary in nature is, of course, one of judicial

> impression dependent upon the fact pattern of a given case. Flexibility of approach is the hallmark of equity, for when we deal with the principles governing equitable intervention, we enter a domain comprising not rigid rules but broad and liberal doctrines that are aimed at achieving a just result according to the facts of a particular case.
>
> Equity has, in keeping with the purpose of its origin, therefore refrained from laying down any strict rules for determining whether a particular relationship is fiduciary in nature or gives rise to fiduciary obligations, leaving the development of its jurisprudence to a case by case basis. The maxim 'the categories of fiduciary relations are never closed' exemplifies the approach that a court of equity adopts in this sphere of human activity. See *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382.

[53] Thus, while I accept that co-venturers may owe one another, for example, a duty of fidelity as part of the fiduciary duties that are imposed upon them by law, I cannot accept that the mere fact that they have entered into a joint venture agreement meant that the relationship was a quasi-partnership. A simple illustration will demonstrate the fallacy of this proposition: an entirely commercial relationship between two large corporations undertaking a joint venture may be documented in a joint venture agreement. In such a case, the scope and limits of the relationship between them will be governed entirely by the terms of the joint venture agreement, read together with the articles of association of the joint venture company, and not by reference to equitable principles. The relationship is patently not a quasi-partnership. However, if the submission of counsel is correct, then all joint venture arrangements are quasi-partnerships, which cannot be a tenable proposition of law.

[54] The decision of the House of Lords in (*Ebrahimi v Westbourne Galleries* [1973] AC 360) acknowledges that there may be instances where the rights and obligations of the members in a company may be governed not just by the provisions of the companies statute and by the terms of the articles of association. In certain circumstances, the courts may not permit a party to insist on the exercise of his strict legal rights, but may instead subject the exercise of such rights to equitable considerations.

[55] What are the circumstances that would give rise to the application of equitable considerations? Lord Wilberforce in *Ebrahimi* provides the answer:

> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing

A partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go B elsewhere.

[56] The three elements referred to by Lord Wilberforce are thus not exhaustive.

C **[57]** Where a company in question is an *Ebrahimi*-type company — that is to say, a company established on a relationship of probity, mutual trust, good faith and confidence — the exercise of a legal right that amounts to a breach of the duties that underpin that relationship of trust, good faith and confidence may entitle the courts to rule that it would be just and equitable for the D company in question to be wound up.

[58] Of course, the present actions before me were premised not upon a petition for the winding up of the JV companies on just and equitable grounds, E but rather on s 181 of the Companies Act 1965.

[59] In *Jet-Tech Materials v Yushiro Chemical Industry Co* [2013] 2 MLJ 297; [2013] 1 AMCR 789; [2013] 2 CLJ 277; [2013] 2 MLRA 345, the Federal Court was asked the following question:

F Whether the interpretation given to the words 'just and equitable' by the House of Lords in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 and by the Privy Council in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] 1 CLJ 441; [1987] CLJ Rep 24 in the winding-up provision of the Companies Act 1965, vis s 218(1) with respect to a quasi-partnership company apply to the interpretation G of the oppression provision in the Companies Act 1965 vis s 181.

[60] The question was answered in the affirmative. Accordingly, if a company fulfils the requirements of Lord Wilberforce in *Ebrahimi* — which is to say that it is in essence a quasi-partnership — the law may superimpose H equitable considerations over the relationship of the shareholders in the company, and may not permit a party to enforce its strict legal rights under the articles of association of the company. In the context of s 218(1)(i) of the Companies Act 1965 (now s 465(1)(h) of the Companies Act 2016), the court may order the company to be wound up if it is of the view that the conduct I complained of was unjust, inequitable or unfair. In the context of s 181 of the Companies Act 1965 (now s 346 of the Companies Act 2016), the wide range of remedies will be available to the court, if it is of the view that the affairs of the company were being conducted or the powers of the directors were being exercised in an oppressive manner, or in disregard of the complainant's

interests, or that some act of the company has been done or threatened or a members' or debenture holders' resolution has been passed or proposed which unfairly discriminates against or is otherwise prejudicial to the interests of the complainant. In determining whether there existed oppression, disregard of interests, unfair discrimination or prejudice, the court may take into account of the fact that the company in question is a quasi-partnership in the *Ebrahimi* sense. This is an important point, because a finding of oppression, disregard of interest, unfair discrimination or prejudice must necessarily be made within the context of the prevailing facts.

[61] I now return to the question posed at the beginning of this section: were the JV companies quasi-partnerships between ISM and MPHB?

[62] In my view, they were.

[63] The reasons for my having arrived at this finding are as follows:

> (a) forged upon a handshake. The key and item of evidence that persuaded me that the relationship between Dato' Ray Cheah and ISM on the one hand and MPHB on the other was one of mutual confidence and trust was the fact that, even though the draft shareholders' agreement had not been signed between the parties, they had nonetheless proceeded with their business relationship;
>
> It was not in material dispute that the parties had first pursued the idea of a joint venture in 2007, beginning with the acquisition of the Lot 646 in April 2007. A draft shareholders' agreement was prepared by MPHB in 2009. Although comments to the draft agreement was passed between the parties, the document was never executed between them. Despite this, it was the common position of the parties that they were bound by the terms of an oral agreement between them. Of course, the precise terms of this agreement was a matter of dispute between them, but nonetheless, the willingness of the parties to continue with the business relationship despite there having been no formal agreement entered into between them established that the relationship was one of mutual confidence and trust;
>
> It was business relationship forged upon a handshake;
>
> (b) driven by consensus. I found that, from the inception of the relationship in 2007 until sometime in 2014 when the relationship began to deteriorate, the business relationship had been run on the basis of a consensus between the parties, with Dato' Ray Cheah taking the lead on the tactical acquisitions of the target real estates. This, in my view, was the probable reality and a fair and accurate

description of the relationship dynamics at the time, because it is consistent with the objective and undisputed facts, which was that Dato' Ray Cheah was a professional real estate valuer of over thirty years' standing (as at 2007. By the time of trial, he had over 40 years' experience in the field: see Q&A 4 of WS-P1), whereas MPHB, even though it was a listed company, was a relative neophyte in the area of real estate investment or development;

At the same time, the partner with the deep pockets was MPHB. Dato' Ray Cheah and ISM on their own did not have sufficient capital to undertake the acquisition of all the contiguous parcels. The parties appeared to be well matched: Dato' Cheah having the experience and the expertise, with MPHB proving the bulk of the financial backing to the venture;

For this reason, I was unable to agree with the contention of the defendants that it was they who took the lead in managing the affairs of the JV companies. There was nothing for them to 'manage'. The JV companies were no more than shell entities incorporated for the primary purpose of holding the real properties to be acquired. Whatever statutory requirements that needed to be fulfilled — such as the holding of annual general meetings — was provided by the corporate secretarial function at MPHB. But the raison d'etre for the existence of the JV companies was provided by the work done by Dato' Ray Cheah;

The fact that decisions affecting the JV companies were made by agreement between the parties was clear even on the defendants' own evidence. This is discussed in further detail at para 89 below;

[64] There were also objective circumstances from which the relationship of mutual trust and confidence can be inferred. For instance, the acquisition of lands in three instances had been undertaken even before ISM became a shareholder in the relevant JV company. This was indicative of the trust that existed between the parties. Dato' Ray Cheah had also put the deposits down out of his own funds for the acquisition of the lands by Queensway Nominees (Asing) Sdn Bhd and Queensway Nominees (Tempatan) Sdn Bhd, when neither he nor ISM was yet a shareholder in those JV companies. Moreover, he or any of his nominees did not have any board representation in those companies at the time. In meetings with third parties and advisors, MPHB had consistently characterised Dato' Ray Cheah as a 'partner' in connection with the Imbi Project.

[65] It would be apposite at this point to recall the words of Lord Wilberforce in *Ebrahimi*, quoted at para 55 above, where he outlined the circumstances under which the court would superimpose equitable

considerations in the business relationship of the parties concerned. The first thing to note that His Lordship was careful not to prescribe a definitive formula. In his words, it would not only be impossible to so but also 'wholly undesirable'. This meant that the criteria set out in *Ebrahimi* was not a closed list, but would be very much dependent on the facts each case under consideration. He suggested three circumstances under which the court may find that the relationship was in law a quasi-partnership: (a) where the association between the parties had evolved from a pre-existing partnership into an incorporated joint venture; (b) where there was an understanding or agreement that the shareholders would participate in the conduct of the business; and (c) where there were restrictions on the transfer of the shareholders' interests in the company. It was clear from the judgment of the House of Lords that not all three criteria need be fulfilled; depending on the circumstances of the case, even if only one criterion was met, the court may find that the business arrangement was a quasi-partnership.

[66] Ms Celine for the defendants referred the court to the English High Court case of (*Brett v Migration Solutions Holdings Ltd and others* [2016] EWHC 523 Ch). Learned counsel cited dicta in this case as authority for the proposition that a quasi-partnership cannot exist where the relationship was purely commercial and arm's length. In that case, Mann J stated as follows:

> (iv) A personal relationship between the petitioner and the controllers of the company is likely to one thing at the heat of actionable unfairness, That is doubtless reflected in the traditional 'quasi-partnership' formulation. Such a formulation is likely to describe a relationship where the relationship is personal rather than purely commercial and arm's length:
>
> > How can it be unfair to act in accordance with what the parties have agreed? As a general rule, it is not. But there are cases in which the letter of the articles does not fully reflect the understandings upon which the shareholders ae associated … Thus the personal relationship between the shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting. (per Hoffman LJ in *Re Saul D Harrison & Sons* [1994] BCC 475).

[67] I do not disagree with the passage quoted above, but would emphasise that I have found as a matter of fact that the relationship was not one that was entirely commercial and at an arm's length, because there had been a great deal of trust and confidence reposed by the parties in one another. It was, in other words, a personal relationship, albeit one that existed between Dato' Ray Cheah on the one hand (acting for ISM), and MPHB though Madam Kheoh, on the other.

[68] Can a personal relationship subsist with a corporate shareholder?

[69] It was advanced for the defendants that it could not, and reference was made to the Court of Appeal case of *Yai Yen Hon v Lim Mong Sam* [1997] 2 MLJ 190; [1997] 2 AMR 1742; [1997] 2 CLJ 812; [1997] 1 MLRA 152. This case involved a petition to wind up a company under just and equitable grounds. The petition in this case pleaded that a quasi-partnership existed between the individual shareholders in the company, but not with a corporate shareholder holding 9.17% of the equity in the company. Reversing the decision of the court at first instance, the Court of Appeal held that the trial judge was wrong to have found that it was not necessary for the petitioner to show that a quasi-partnership existed between all the shareholders inter se:

> With respect, we are unable to agree with the view of the learned Judge that the minority shareholders can be ignored in a company, be it a quasi-partnership company or not. The minority shareholders in the company are Shaikh Said Shaikh Mohd. holding 3.67% and a private limited company called Poi Tee Holdings Sdn. Bhd. holding 9.17% in the equity of the company. The respondent did not claim them to be his quasi-partners. We wonder how one individual shareholder can establish a personal relationship of quasi-partnership with a corporate shareholder.

[70] Learned counsel for the defendants before me placed reliance on the last sentence in the quotation above as authority for the proposition that a quasi-partnership cannot exist between the shareholders of a company where at least one of the shareholders is a corporation.

[71] There is, however, higher authority for the contrary view. In *Pan-Pacific Construction Holdings v Ngiu-Kee Corp* [2010] MLJU 269; [2010] 6 CLJ 721; [2010] 1 MLRA 761, the Federal Court accepted that there existed, between two corporate shareholders in a company, a relationship of mutual trust and confidence akin to a partnership (see para 30 of the judgment of the court). In that case, the petitioner, who was the minority shareholder, sought to acquire the shares held by the majority shareholder in the subject company by way of a petition under s 181 of the Companies Act 1965. Although the petitioner was ultimately unsuccessful, it was not because a quasi-partnership could not subsist between corporate shareholders. The petitioner in this case failed because it failed to establish that the actions of the majority shareholder was unfairly prejudicial to its interests.

[72] Of course, just because the relationship between ISM and MPHB in respect of each of the JV companies was a quasi-partnership does not mean that the plaintiff was entitled to the reliefs prayed for. In order to succeed, the plaintiff must also establish that there existed on the part of MPHB conduct oppressive of ISM's interests, conduct in disregard of its interests, unfairly discriminatory conduct or conduct that was prejudicial to the interests of ISM (see *Pan Pacific Construction Holdings v Ngui-Kee Corp*). The common thread that binds these categories are the notions of commercial unfairness and a

departure from what may be considered to be standards of fair dealing. This issue is considered in detail at paras 131 below.

[73] In the following paragraphs, I address the issue of the terms of the oral agreement entered into between the parties in respect of the JV companies.

The terms of the oral joint venture agreement

[74] As explained earlier, it was common ground between the parties that there had existed an oral agreement between ISM and MPHB regarding the terms of their joint venture. A draft shareholders' agreement was circulated by the MPHB on 24 July 2009. The plaintiff did not raise any major objections to the terms of this first draft shareholders' agreement. In fact, in the course of trial, Dato' Ray Cheah conceded that he considered the plaintiff to be bound by the terms of the first draft shareholders' agreement, save for cl 12.4 (which provided that the shareholders' agreement did not constitute a partnership between the parties). It was only come eight months later, in March 2010, that Dato' Cheah provides a response to the first draft shareholders' agreement. He did so by proposing an entirely new draft shareholders' agreement, rather than providing comments to the original draft provided by MPHB. No formal shareholders' agreement was ever executed between the parties.

[75] Even though it was agreed between the parties that an oral agreement existed, there was nonetheless material disputes between them as to what the terms of this oral agreement were. In my view, the terms of the oral agreement was material to the outcome of the case, for the following reason.

[76] The crux of a claim for oppression involves a determination of whether the conduct of the defendant had been commercially unfair or, put another way, there had been a visible departure from the standards of fair dealing or a violation of the conditions of fair play. What is commercially fair must be determined in the context of what the parties have themselves agreed, whether such terms are contained in the articles of association, or in a shareholders' agreement entered between them. The terms of the shareholders' agreement are thus relevant for the determination of whether there had been oppression of the rights of the plaintiff, although as we shall see, not all breaches of the terms of a shareholders' agreement will give rise to actionable oppression.

[77] The plaintiff claimed that the oral agreement included the following terms:

(a) the equity in the JV companies was held on a ratio of 30:70, with 30% to be held by ISM and 70% by MPHB;

(b) the funding for the JV companies was to be divided into a cash portion

and a loan portion, apportioned on a 30:70 basis. Of the cash portion, ISM would be liable to contribute 30% (in other words, 30% of 30%, or 9% of the total funds required in respect of each JV company).The plaintiff's position was that MPHB would be liable to contribute 70% of the cash portion, and would also be liable to fund the entire loan portion, at a rate of interest of 8%pa. In other words, MPHB (according to the plaintiff) was liable to contribute 91% of the total funding required by each JV company for the acquisition of the lands; and

(c) all decisions regarding the JV companies were to have been made on a consensus basis.

[78] As far as the funding terms were concerned, I was of the view that the expression 'cash portion' was slightly misleading. Based on the explanation received at trial from Dato' Cheah, the cash portion would be better described as interest-free shareholders' advances, while the loan portion was an intercompany loan from MPHB, which loan would attract interest at a rate of 8%pa.

[79] MPHB disputed the funding terms. Its position was that the shareholders would contribute its proportionate share to the funding requirements of the JV companies. Hence, according to MPHB, ISM would be required to provide funding for 30% of the total funding requirements of the JV companies, and not merely 9% as alleged by the plaintiff.

[80] Having examined the contemporaneous documentary evidence in this case carefully, I formed the view that it was never the intention of the parties that ISM funds its proportionate share of the loan portion. In other words, the agreement between the parties was that ISM would fund only 30% of the 'cash portion'. MPHB would finance the remainder of the cash portion, while the loan portion was to be funded by an intercompany loan from MPHB, bearing interest at 8%pa.

[81] There were numerous items of correspondence emanating from MPHB itself that supported this conclusion. Among them were the following:

(a) on 19 September 2008, an MPHB staff by the name of Ooi Chai Ngoh wrote an email to Dato' Cheah providing him with a spreadsheet showing the amounts due from him as at that day in respect of Queensway Nominees (Tempatan) Sdn Bhd, Queensway Nominees (Asing) Sdn Bhd and West-Jaya Sdn Bhd (see B1/124 of the trial bundles). The calculation in this spreadsheet clearly showed that Dato' Ray (through ISM) was liable to contribute 30% of 30% (ie 9%) towards the purchase price for the lands held by the various entities. By contrast, the expenses incurred in respect of the

acquisition and the rental income obtained from the properties (where applicable) had been apportioned proportionate to the shareholding in the entities;

The differing treatment of expenses and income on the one hand compared to funding contributions on the other, supported the version of events put forth by the plaintiff;

(b) on 2 August 2007, MPHB sent to Dato' Cheah a spreadsheet showing the amounts due and payable by him (through ISM) (see B1/30). The spreadsheet lists all the lands that had been acquired up to that date. In respect of each purchase, the total purchase price was shown. The second row in the spreadsheet read '70% to be financed by MPHB @8%pa' After deducting this amount, the individual contribution of the shareholders was calculated, which showed that ISM/Dato' Cheah was only liable to contribute 30% of the remaining 30% of the purchase price, ie just 9% of the total purchase price;

(c) on 20 July 2009, MPHB sent another email to Dato' Cheah (see B2/509), attaching a spreadsheet showing the amounts outstanding from each shareholder in respect of Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and West-Jaya Sdn Bhd. Here again the spreadsheet calculated 'RC's portion' as being 30% of 30% of the purchase price. This contrasts with the other expenses such as legal fees and stamp duties as well as income attained from the relevant properties, which were apportioned according to the shareholders' equity in the relevant JV companies;

(d) on 8 January 2010, MPHB sent another email to Dato' Cheah in a similar vein (see B2/692), this time attaching schedules that showed the amounts of outstanding shareholder contributions for four companies: Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd, West-Jaya Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd. Here again, the calculations show that ISM/Dato' Cheah was liable to contribute 30% of the 'cash portion', and not 30% of the total purchase price. For example, at B2/694, the purchase price for Lot 643 was RM6m. Of this, 'RC's portion' was stated to be RM540,000;

RM540,000 ÷ RM6,000,000 = 0.09 or 9%.

(e) at B12/3694–3697 of the trial bundles were letters dated 11 March 2008 from Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and West-Jaya Sdn Bhd signed by Madam Kheoh and addressed to MPHB confirming that 70% of the purchase price of the identified real estates would

A be financed by an intercompany loan from MPHB bearing interest at 8%pa.

[82] My conclusion is also supported by inferences that can be made from the primary undisputed facts. For instance:

B

(a) if the defendants were correct that ISM had failed to contribute its 30% share of the funding required to acquire the relevant properties, it would follow that ISM had been in default of its obligations from the very beginning, and would have been a clear indication of the lack of C reliability and creditworthiness on the part of Dato' Ray Cheah. Yet the parties continued in their joint venture relationship for a long time over numerous transactions; and

(b) ISM only became a shareholder in Mulpha Kluang Maritime Carriers Sdn Bhd in 2012. Would MPHB allow this company to issue shares to D ISM if it had been in default of its funding obligations? Clearly not. From the undisputed primary facts that shares in Mulpha Klang were issued long after the acquisitions by Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and West-Jaya Sdn Bhd had E been completed, it can reasonably be inferred that ISM had not been in fundamental breach of its funding obligations in respect of these three JV companies, or else MPHB would not have caused shares in Mulpha Kluang to be issued to ISM.

F **[83]** As evidence of the plaintiff's liability to contribute to the funding requirements for the JV companies in proportion to the shareholdings held in the companies, learned counsel for defence pointed to the sum of RM2,243,340.40 that was by paid by or on behalf of ISM to MPHB on 3 October 2012. This payment, according to the defendants, proved that ISM G had paid the interest costs for the loan portion (which according to the plaintiff's own case, was entirely the responsibility of MPHB).

[84] At trial, Dato' Ray Cheah testified that he had confronted both Ooi H Chai Ngoh, a staff of MPHB, and Madam Kheoh regarding this interest item and told them that this was not part of the understanding between the parties. Dato' Cheah eventually relented and paid the amount as a gesture of goodwill when told by Madam Kheoh that this would be a one-time payment.

I **[85]** Tellingly, the amounts came to be recorded in the books of Queensway Nominees (Asing) Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd Bhd and West-Jaya Sdn Bhd as interest income from a corporate shareholder. If ISM bore the obligation to finance the interest charges for 30% of the loan portion, then the sums paid ought to have instead been received by, and recorded in the

books of, MPHB, in order to reimburse the interests costs that it had (purportedly) incurred on behalf of ISM.

[86] In my view, the episode regarding the sum of RM2,243,340.40 was symptomatic of the cavalier disregard that MPHB had for the position and rights of ISM under the agreement between them, which was soon to be manifested in even more overt ways further down the line. This was not a relationship of equals, and MPHB appeared to be sanguine about using its superior position to extract an advantage over ISM.

[87] Madam Kheoh testified at trial that the loan portion was in substance an indirect loan to Dato' Cheah (or ISM) which was dressed up as a loan to the JV companies. She said that in July 2007 that Dato' Cheah had asked for an intercompany loan to fund ISM's loan portion. No loan could have been given directly to ISM, as this would have breached the Listing Requirements of Bursa Malaysia (which generally prohibited a listed company from lending to entities outside its group). It was also for this reason — it was asserted — that there was no contemporaneous written evidence of any loan to Dato' Cheah or ISM. Instead, the funding was documented as a funding to the JV companies directly.

[88] However, this does not explain why there was no contemporaneous correspondence at all supporting this version of events. Even if the statutory records could have been window-dressed, there surely should have been some evidence of the contended version of events recorded in non-public correspondence between them. Instead, there was none at all. On balance, I found favour with the version of events put forward by the plaintiff, and was of the view that the position of the defendants as painted by Madam Kheoh was no more than an afterthought. For this reason, I treated the entire of her testimony with caution.

[89] On the decision making process adopted in respect of the JV companies, there was abundant evidence that showed that decisions — certainly all major decisions — were made by consensus between the parties. Datuk Vijeyaratnam Pillay, who was a director of three of the JV companies, testified at trial that the decision-making process in the JV companies had been undertaken by way of consensus between the respective representatives of MPHB and ISM. Dato' Vijey is the managing director of his own corporate advisory services company, and — it appears — sat on the boards of the three companies as a nominee of MPHB. His testimony ought therefore be given due weight, given that he was also a defendant in three of the suits and had no particular interest in agreeing with the position put forward by the plaintiff. In addition, the MPHB's own documents stated that important decisions

regarding the JV companies was decided by consensus between ISM and MPHB (see, for example, B9/3051 at para 11, B9/3052 at para 15, and B10/3231).

[90] It was advanced by counsel for the defendants that, although it was the parties' common position that there existed an oral agreement between them, that oral agreement related only to Caribbean Gateway Sdn Bhd, and it was subject to the condition precedent that the Caribbean Gateway Sdn Bhd completed its acquisition of the Imbi lands from the JV companies. Because those acquisition never proceeded, that oral agreement — it was argued— remained contingent due to the unfulfilled condition precedent.

[91] In my judgment, even though the drafts of the shareholders' agreement contemplated that the joint venture entity would be Caribbean Gateway Sdn Bhd, this did not negate the existence of an oral agreement relating to the JV companies. Quite clearly the specific terms of the drafts of the shareholders' agreement were not binding on the parties, as neither drafts were executed by the parties. Nonetheless, the objective facts show that, beginning in 2007 (which was more than two years prior to the appearance of MPHB draft shareholder's agreement), the parties had proceeded to pursue their joint venture through the acquisition of the Imbi lands.

[92] By the time the first draft shareholders' agreement was circulated by MPHB in July 2009, Queensway Nominees (Asing) Sdn Bhd had completed its acquisition of Lots 646 and 200, Queensway Nominees (Tempatan) Sdn Bhd had completed its acquisition of Lot 642, West-Jaya Sdn Bhd had completed its acquisition of Lot 637 and Leisure Dotcom Sdn Bhd had committed to purchase the De Vegas land. The total value of these acquisitions was over RM147m. Having expended or committed such a substantial amount into the joint venture, it would seem inconceivable that the parties would have done so without there being an agreement or arrangement between them. If that agreement or arrangement did not in law constitute a contract, then in my view such agreement or arrangement would nonetheless be binding on joint venture parties on the principles established in *Ebrahimi*'s case, and it would not be open to MPHB to insist upon its strict legal rights under the articles of association of the relevant JV company. If, on the other hand, such agreement did constitute a legally binding oral contract, then it would have come into existence well before the circulation of the first draft shareholders' agreement in July 2009.

Whether ISM can sustain a claim for oppression on a purported breach of a shareholders' agreement?

[93] It was advanced for the defendants that a shareholders' agreement can never form the basis for a claim of oppression. Learned counsel for the defendants referred the court to the Federal Court case of *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal* [2013] 2 MLJ 297 as authority for this proposition.

[94] The claimant in that case, Jet-Tech, alleged oppression by the majority shareholder, Yushiro, a company located in Japan that manufactured cutting oil used in metal working. Yushiro was initially a minority shareholder in a joint-venture company established between the parties. The parties entered into a shareholders' agreement to regulate their rights inter se. Yushiro subsequently acquired more shares in the joint venture company, as a result of which it obtained 51% shareholding in the company and control of its board of directors. The plaintiff claimed, among others, that Yushiro had used its majority shares to remove Jet-Tech's nominated director to the board of the joint-venture company and to also prevent Jet-Tech from removing its nominated directors, contrary to the terms of the shareholders' agreement entered between them.

[95] The Federal Court in that case held as follows:

> [37] It was alleged by the appellants that Yushiro's conduct in refusing to allow Chen to remove Gan and Firdaos as directors of the company amounted to a breach of the shareholders agreement. In this regard we are in agreement with the submission of learned counsel for the respondents that breaches of a shareholders agreement cannot be a basis for bringing a petition under s 181. A complaint under s 181 of the CA must be confined to matters relating to the affairs of the company. Shareholders' agreement and breach of the same clearly are not matters relating to the affairs of the company. They are private matters enforceable by the parties to the shareholders agreement (see *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors* [1999] 3 MLJ 262, *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 and *Russel Northern Bank Development Corp Ltd & Ors* [1992] BCLC 1016).

[96] Learned counsel for the defendants relied upon the foregoing passage for the proposition that the breach of the terms of a shareholders' agreement can never form the basis of a claim for minority oppression.

[97] In my considered and respectful view, the proposition advanced by learned counsel overstated the findings of the Federal Court. In my judgment, the case of *Jet-Tech* does not stand for the proposition that a case for minority oppression can never be brought consequent upon a breach of the terms of a shareholders' agreement; rather, the true ratio decidendi in that case was that the breach that was contended to have occurred in that case merely related to matters affecting the shareholders inter se, and did not affect matters relating to the affairs of the company in question. As a consequence, the purported breach

of the shareholders' agreement did not result in any actionable oppression against the plaintiffs in that case.

[98] Three cases were referred to in the judgment of the Federal Court. In the following paragraphs, I examine these cases in detail. A proper understanding of these cases will, in my respectful view, demonstrate my point in the preceding paragraph.

[99] In *Russell v Northern Bank Development Corp* [1992] BCLC 1016, the shareholders of a company entered into an agreement between themselves agreeing that the capital of the company may not be increased without the consent of the shareholders. The company was a party to this agreement. At first instance, the judge ruled that the agreement was unenforceable as it operated as a fetter upon the company's statutory right to increase its capital. The decision was upheld by a majority of the Court of Appeal of Northern Ireland, but reversed on appeal to the House of Lords. The House of Lords held that, even though a formal undertaking by the company not to exercise its statutory powers would be unenforceable but this undertaking was severable from the shareholders' agreement, and there was nothing to prevent the shareholders from agreeing inter se to increase the capital of the company only with the consent of all shareholders. This agreement operated as a personal agreement between the shareholders and did not purport to bind future shareholders and hence did not fetter the company in the exercise of its statutory powers.

[100] In *Beh Chun Chuan v Paloh Medical Centre* [1999] 3 MLJ 262; [1999] 3 AMR 3352; [1999] 7 CLJ 1; [1999] 2 MLRH 840, the petitioner commenced an action under s 181 of the Companies Act 1965 alleging minority oppression. The petitioner was a minority shareholder in a joint venture company, in respect of which the shareholders had entered into a shareholders' agreement. The petitioner and his nominee director had been removed from the board of directors of the company for failing to declare their interests in other companies that had entered into tenancy agreements with the joint venture company. The petitioner sought to argue that the removal gave rise to actionable oppression under s 181.

[101] The High Court dismissed the claim, holding:

> *Whether the petitioner can ignore the article of association and rely on the shareholders' agreement to find oppression:*
>
> A shareholders' agreement is essentially a contract between the members of the company to regulate their conduct and define their duties and obligations inter se in the running of the company. (See Graham Stedman and Janet Jones — Shareholders' Agreement (2nd Ed, Longman) at 1.42).
>
> However, a shareholders' agreement only creates personal obligations. This

principle had been established in the judgement of Lord Davey in *Welton v Saffery* [1895–99] All ER Rep 567 at p 585 and applied more recently in the House of Lord case of *Russell v Northern Bank Development Corp Ltd & Ors* [1992] 3 All ER 161 at 166 per Lord Jauncey, the relevant passage of which was as follows:

> Of course, individual shareholders may deal with their own interests by contract in such a way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an *exceptio personalis* against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders.
>
> It follows that in order to ensure that the terms of the shareholders' agreement shall bind the shareholders inter se under the Companies Act 1965, it would be necessary to incorporate them into the articles of the company. In the instant case, however, the shareholders did not initiate any proposition to amend the articles to incorporate the terms in the shareholders' agreement into the articles pursuant to cl 14.1.
>
> There appears to be no case law directly on point in our jurisdiction whether a breach of the terms in a shareholders' agreement can be used as a basis of a complaint of oppression under s 181 of the Companies Act 1965, where the exercise of the act by the directors, or where the affairs of the company are conducted in violation of the agreement but nevertheless within the governance of the articles of association.
>
> However, the Singapore Court of Appeal had ruled in *Lim Cheng Huat Raymond v Teoh Siang Teik* [1996] 3 SLR 605 at p 621inter alia that an allegation of oppression under s 216 of the Companies Act (Cap 50, 1994 Ed) the equivalent of s 181 of our Companies Act 1965, cannot be founded on a loan agreement contracted between the petitioner and the respondent in that case wherein the respondent had agreed to transfer some shares to the petitioner, but had later allegedly reneged on his promise. It was held that the refusal to transfer the shares to the petitioner had nothing to do with the conduct of the affairs of the company or an act carried out by him in exercise of his powers as a director of the company. The petitioner, it was held, was at liberty to vindicate his claim on the agreement by taking out a separate action.
>
> Here in our own jurisdiction, in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals* [1996] 1 MLJ 661 the Court of Appeal had to decide whether the claim of a legitimate expectation by Leong Hup to have a permanent seat on the Board of Directors of a company called Kentucky Fried Chicken Holdings (M) Bhd (KFCM) could be made the basis of a petition for relief under s 181 of the Act. The legitimate expectation arose from an alleged representation and oral agreements made with the other directors, which were not incorporated into the articles of association of the company. Mahadev Shanker JCA, speaking for the court said at p 692:
>
> > So far as legitimate expectation is concerned, I need not go into the other cases cited, except to say that *Re Tottenham Hotspur plc* [1994] 1 BCLC 695 is yet another instance where the court declined to take cognizance of

> an alleged private arrangement between two shareholders as to control of a public company. From any point of view, KFCM cannot be regarded as a quasi-partnership between just Leong Hup and Ishak and George Ting or the interest they are alleged to have represented in March 1993. It may be that at that time these people were prepared to leave matters relating to their share ratios and increases of capital in KFCM fluid thus indicating mutual trust and confidence but if they regarded these matters as important, we think it was imperative not only that the agreements on such matters should have been put into writing but also the articles of association should have been amended so as to substantiate the claim that is now being made.

The *Leong Hup* case did not go so far as to rule that a petition under s 181 could or could not be based on a shareholders' agreement per se. But it seems clear to me that it had at least set the mood and pace if not the law, that any petition for relief under s 181 based on a complaint outside the articles of association is unlikely to succeed.

There is strong rationale in support of this proposition. Much like a club is governed by its constitution, a company is governed by its memorandum and articles of association. A company's memorandum and articles are therefore the cananic yardstick upon which the legality of its act and those of its officers must be tested and any acts of the company or of its officers which are opposed to its memorandum or articles are likely to be struck down by the court as ultra vires. To rely on extrinsic document to determine the legality of the act of the company or of its directors would be to invite uncertainty in corporate governance.

But that is not to say that a breach of a shareholders' agreement can never be made the subject of oppression. It can — provided that the act complained of under the agreement falls outside the governance of the articles and cannot be justified under it. 'Oppression' in the context of s 181(1)(a) is after all an inexact equitable concept. In the words of Buckley LJ in *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184 at p 199c:

> ... oppression occurs when shareholders, having a dominant power in a company, either: (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs; or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1958] 3 All ER 66 at p 71: ' burdensome, harsh and wrongful' to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs: see *Scottish Co-operative Wholesale Society Ltd v Meyer and Re HR Hammer Ltd* [1958] 3 All ER 689. We do not say that this is necessarily a comprehensive definition of the meaning of the words 'oppressive' in s 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition. We think, however, that it may serve as a sufficient definition for our present purpose. Oppression must, we think, import that the oppressed are being

> constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor. If a director of a company were to draw a remuneration to which he was not legally entitled to or in excess of the remuneration to which he was legally entitled, this might no doubt found a misfeasance proceedings or proceedings for some other kind of relief, but it would not, in our judgment, of itself amount to oppression. Nor would the fact that the director was a majority shareholder in the company make any difference, unless he had used his majority voting powers or retain the remuneration or to stifle proceedings by the company or other shareholders in relation to it.

Thus in *Re A & BC Chewing Gum Ltd; Topps Chewing Gum Inc v Coakley & Ors* [1975] 1 All ER 1017 the repudiation by certain shareholders of another shareholder's right to appoint a director in contravention of the shareholders' agreement, was held by Plowman J of the Chancery Division to constitute an oppression and therefore rendered it just and equitable that the company be wound up under s 222(f) of the Companies Act 1948 of the United Kingdom. The repudiation had contravened not only the shareholders' agreement but also the articles of the company which had been amended earlier to reflect the terms agreed to by the shareholders in the shareholders' agreement.

Nearer home, the *Chewing Gum* case was applied by the Singapore Court of Appeal in *Teo Choon Mong Frank v Wilh Schulz Gmbh & Anor* [1998] 2 SLR 529 in an application for a restraining order against the oppressive conduct of shareholders in a company. In that case the court had to decide whether the acts of the respondents in removing the appellant as a director of a company contrary to the term of a shareholders' agreement which had also violated the relevant articles of association, constituted a repudiation of the agreement. The question was answered in the positive; an injunction lie to restrain the respondent's action until the trial. *A fortiori*, an oppression under s 181 of the Companies Act 1965.

In both these cases it will be noted that the shareholders' agreement was incorporated into the articles of the companies, unlike in the instant case. The respective oppression complained of was in fact tested against the articles of association and not merely against the terms of the shareholders' agreement. It would not make any legal sense if the legality of the conduct of the director or the company are tested against any extrinsic documents, the effect of which would render absurd the established principle that the company's governing constitution is always its memorandum and articles of association.

I am therefore bound to find the submission that the shareholders' agreement governed the conduct of the first respondent company and prevailed over its articles of association untenable. In the event, it follows that all the complaints put forth by the petitioner and described below which are anchored on the breach of this agreement must fail.

But even assuming that the shareholders' agreement could be made the basis of oppression in place of the articles of the Company, I do not find any of the complaints oppressive that would require a relief under s 181 of the Companies Act 1965.

[102] I have reproduced the passages from this judgment in extenso because — as will explained in due course — I am of the view that the learned judge fell into error when he misunderstood the ratio decidendi of *Russell v Northern Bank Development Corp*.

[103] The learned judge in that case accepted that a claim of oppression may well be capable of being premised upon breach of the terms of a shareholders' agreement, but that this was only possible where the terms of the shareholders' agreement had been incorporated into the articles of association of the company. The premise of this conclusion was the principle — which the judge understood to have been expounded by the House of Lords in *Russell v Northern Bank Development Corp* — that a shareholders' agreement would only capable of binding the company if it was incorporated into the articles of association.

[104] This premise, in my considered judgment, was incorrect. The reason that the term in the shareholders' agreement in *Russell v Northern Bank Development Corp* requiring the consent of the shareholders for any increase in capital of the company was not binding on the company was due to the fact that it operated as a fetter on the statutory powers of the company conferred under the Companies (Northern Island) Order 1986. The term was thus unenforceable against the company, although this term continued to operate between the shareholders inter se. This does not mean that a shareholders' agreement can never be binding on a company; whether this is so will ordinarily depend on whether the company has been made a party to the agreement.

[105] Customarily, where an agreement has been entered into between parties proposing to incorporate a company, such as agreement is titled a shareholders' agreement. Because it is a document that comes into existence prior to the incorporation of the company, the company can never be made a party to the agreement.

[106] There may also be instances where the cooperative terms have been agreed post-incorporation, and the company is then made a party to the agreement. Typically, this document by practice and custom is titled a joint venture agreement. There is, however, nothing in the labels of the documents themselves, and there would be nothing to prevent the agreement to which the company is a party to be labelled a shareholders' agreement.

[107] Now, even where the terms of the joint venture agreement has not been incorporated into the articles of association, the company would be bound by its terms for as long as it was privy to the agreement, unless any term of the agreement is found to be unenforceable (as was the case in *Russell v Northern*

Bank Development Corp). Of course, for as long as its terms have not been incorporated into the statutory contract that is the articles of association, such terms would not be binding on future shareholders. It is for this reason that shareholders' agreements would typically contain a covenant by an exiting shareholder to procure that the party to whom it may sell shares (ie the incoming shareholder) to undertake to agree to be bound by the terms of the shareholders' agreement.

[108] It has also to be remembered that there may be legitimate commercial reasons for parties to deliberately make a conscious choice NOT to incorporate the terms of a joint venture into the articles of association. One of the reasons is that the terms of the joint venture may be confidential or may contain commercially-sensitive information. If the terms are incorporated into the articles of association, such terms would become part of the public record, viewable by anybody who has paid the relevant fees at the Companies Commission to obtain a copy of the memorandum and articles of association.

[109] There is a second reason why the proposition that a breach of a shareholders' agreement can only be actionable as oppression if the relevant term claimed to have been breached has been incorporated into the articles of association cannot be said to be of universal application. This is as follows.

[110] Where the joint venture company has been held to be an *Ebrahimi*-type company, the law imposes standards of equitable and fair-dealing on the relationship between the shareholders. Thus, where an action by one shareholder contravenes the understanding and expectations of mutuality between the parties that underpinned a finding that the company was an *Ebrahimi*-type company, that act may well be found to amount to oppressive conduct. In my judgment, there is nothing to prevent the court from finding that the relationship of mutual confidence arose because the parties considered themselves bound by the terms of an agreement between them, as was the case here. In the present case, the agreement was an oral agreement. Where one party had conducted itself in breach of this agreement and where that breach was sufficient to amount to oppression or oppressive conduct, I see no reason why this could not form the basis for an action under s 181 of the Companies Act 1965.

[111] The third case referred to by the Federal Court in *Jet-Tech* was the Court of Appeal case of *Tuan Haji Ishak bin Ismail v Leong Hup* [1996] 1 MLJ 661; [1996] 1 AMR 300; [1996] 1 CLJ 393; [1995] 2 MLRA 198, which was also referred to by the High Court in *Beh Chun Chuan v Paloh Medical Centre*.

[112] Briefly stated, this case involved a boardroom tussle over KFC Holdings (M) Bhd, which was then a publicly listed company. Leong Hup Holdings

Bhd, the petitioner in this case, sought to prevent the removal of its nominees to the board of directors of the company. Leong Hup held almost 30% in the share capital of the company, and it was contended that the circumstances under which it had come to acquire this stake led it to having acquired a legitimate expectation to continue to be represented on its board.

[113] The Court of Appeal rejected the notion that there existed any such legitimate expectation because the company was indisputably not an *Ebrahimi*-type company. Any agreement that may have existed between the shareholders for Leong Hup to be represented on the board could not have the effect of binding the company. The Court of Appeal stated:

> The parallels which need underlining were these. KFCM was not a small private company. It was a public listed company. Even if it was accepted that Leong Hup bought the shares it did between 24 February and 1 March 1993 on the basis of the representations of the first and second respondents that it would always have board representation on KFCM, that was a private agreement between Leong Hup and some of the directors of KFCM who, at best, controlled 32.67% of KFCM's votes. This private arrangement that the Lau brothers would always sit on the board of KFCM was not made a part of the company's articles or disclosed to the investing public. The management agreement was silent on any question of board representation. The subsequent appointment of the Lau brothers to the KFCM board was by the company in its AGM, ie by a majority of all the shareholders present. There was nothing to stop Leong Hup from disposing all its shares on the open market. For that matter, there was nothing to stop the fourth to the seventh respondents from disposing its shares either. Indeed, the figures given in the petition show that there was a change in the percentages of the shares held by the parties. In March 1993, Leong Hup only acquired 20.27%. By the time of the confrontation, Leong Hup had increased its stake to 29.65%, ie by about another 9.5 million shares. With these kind of movements taking place, the 'cause of action' Leong Hup claimed lacks definition. Was its alleged entitlement to board representation binding on KFCM as a company, and/or against all the shareholders of KFCM and/or against the fourth to the seventh respondents and/or all the shareholders of these companies? If these shareholders in turn sold their shares, as they were free to do, were these new shareholders bound to keep Leong Hup's nominees on the board of KFCM as long as Leong Hup wished? Viewed in this light, the boundaries of Leong Hup's claim to board representation and the identities of the parties against whom that claim was said to be enforceable becomes nebulous to the point of negating the suggestion that their alleged right had crystallized into an enforceable cause of action.

[114] Moreover, the right of the company in general meeting to remove a director was an unfettered right of a public company conferred under the Companies Act 1965, and any agreement to the contrary would not be enforceable:

> Transposed to s 128(1) of our Act, the proper meaning of 'A public company may by ordinary resolution remove a director ...' means that a simple majority of the

shareholders of the company may vote to remove a director and no agreement made by the directors or the company can fetter that right. The courts will not interfere with the statutory right of shareholders to remove directors: *Solaiappan v Lim Yoke Fan & Ors* [1968] 2 MLJ 21; *Dato' HM Shah & Ors v Dato' Abdullah bin Ahmad* [1991] 1 MLJ 91, a Supreme Court decision which applied s 128(1) and upheld the shareholders' right to terminate the appointment of the executive chairman and managing director of the company in the ninth month of a three-year contract with the company appointing him to those positions.

[115] As acknowledged by the High Court in *Beh Chun Chuan v Paloh Medical Centre*, the Court of Appeal in *Tuan Haji Ishak Ismail v Leong Hup* did not go so far as to suggest that breach of the terms of a shareholders' agreement cannot give rise to a claim for oppression.

[116] The analysis set out in the preceding paragraphs shows that *Jet-Tech Materials* did not introduce a principle of general application that an action for oppression cannot never be mounted premised upon breach of the terms of an agreement entered into between the shareholders of a company. In my respectful view, the better view would be that in *Jet-Tech Materials*, the Federal Court was of the view that the mere breach of a terms of a shareholders' agreement was not actionable under s 181 absent a finding that there existed oppression, disregard, unfair discrimination or unfair prejudice against the complainant.

[117] It is well settled that whether or not there was oppression, disregard, unfair discrimination or prejudice in any particular case must be determined from the facts of each case (*Owen Sim Liang Khui v Piasau Jaya* [1996] 1 MLJ 113; [1996] 2 AMR 2477; [1996] 4 CLJ 716; [1995] 2 MLRA 461). Accordingly, a particular act in the context of one case may be held not to be oppressive conduct, but that same act in the circumstances of a different case may well be. In this regard, caselaw would be useful for the principles that were considered and applied, but the decision in each case must be arrived at based on the particular facts of that case. For this reason, I am unable to accept a proposition of general application that a breach of an agreement between shareholders can never amount to actionable oppression under s 181 of the Companies Act 1965.

[118] The appellant in the Federal Court case of *Looh Siong Chee v Numix Engineering* [2015] 4 MLJ 561; [2015] 5 AMR 477; [2015] 7 CLJ 561; [2015] 4 MLRA 471 (FC), which was decided after *Jet-Tech Materials*, argued precisely the same point put forward to me by counsel for the defendants here. In that case, one of the issues was described by the Federal Court in the following manner:

[22] It was argued by the appellants and relying on the recent Federal Court

A decision in *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and Another Appeal* [2013] 2 CLJ 277, that breaches of a shareholders' agreement could not be a basis for a petition under s 181.

B **[119]** The appeal was dismissed because the Federal Court was of the view that the question of whether there had been oppression was a determination of fact that had adequately been addressed by both the High Court and the Court of Appeal:

> [31] In the appeals before us, from the judgments of the courts below, part of which have been quoted in the earlier parts of this judgment, it is clear that the core issue relating to the test under s 181 are factual centric in nature. The courts below have made concurrent findings of facts based on the evidence adduced and produced at the joint-trial. Based on the evidence (both oral and documentary) and the circumstances of the case, we see no reason to interfere with the said concurrent findings.

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[120] The petitioner in *Looh Siong Chee v Numix Engineering* made a claim under s 181 of the Companies Act 1965. The High Court (the decision of the High Court is reported as *Numix Engineering v Magic Telecom* [2011] 9 MLRH 878) found that, amongst others, the other shareholder in the company had wrested control of the company from the majority shareholder by causing ordinary shares to be issued to a person associated with him, in breach of the shareholders' agreement entered into between the shareholders, which contained a clause providing for agreed proportions. The petitioner's shareholding was diluted from 65% to 13% as a consequence. This, according to Anantham Kasinather J, amounted to oppression of the petitioner's interests as a shareholder in the company.

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[121] Aggrieved with the decision of the High Court, the other shareholder and his associate company appealed. It was argued before the Court of Appeal that the shareholders' agreement between the petitioner and the other shareholder was purely a private arrangement between them. The Court of Appeal rejected this argument (the decision of the Court of Appeal is reported as *Sejahtera Saluran v Numix Engineering* [2013] 1 LNS 1279; [2013] MLRAU 403), holding as follows:

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> 22. Before us, it was submitted by learned counsel for the appellants that the RM4 million ordinary shares allocated to the appellant was not temporary in nature. The equity participation in Magic on the basis of 65%-35% between the respondent and LSC cannot be perpetual. Such agreement, if any was a private arrangement between the 1st respondent and LSC. The trial judge overlooked the fact that Sejahtera was not a party to the [shareholders' agreement] or the MOU and that there was no evidence that the parties intended Sejahtera be bound by the terms of the [shareholders' agreement].
>
> 23. We cannot agree with the above submission.

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> 24. It was a term of the [shareholders' agreement] that all new capital was to be raised by way of RCPS and not ordinary shares. Clearly, the allotment and issuance of the 4 million ordinary shares and which was against the 'agreed proportions' was contrary to the provisions of the [shareholders' agreement]. Hence, conditions were imposed on LSC to redeem the RM4 million shares and convert them to RCPS in which he failed.

[122] In my view, the fact that the final appeal was dismissed by the Federal Court lays to rest the question of whether a claim for oppression can be made based on a contended breach of the terms of a shareholders' agreement or joint venture agreement that has not been incorporated into the articles of association. The key and determinative question is whether breach complained of amounted to commercial unfairness against the plaintiff, or a visible departure from the standards of fair play. What is commercially fair must be determined in the context of what the parties have themselves agreed, whether such terms are contained in the articles of association, or in a shareholders' agreement entered between them.

[123] In *Liew Teck Fook v Chan Yip Pooi* [2005] 5 CLJ 20; [2004] 3 MLRH 329, a case that was decided before the decision of the Federal Court in *Jet-Tech Materials*, Kang Hwee Gee J allowed the petition under s 181 of the Companies Act 1965, finding that, even though the shareholders in the joint venture company had entered into a joint venture agreement, this did not preclude the petitioner from mounting a claim for oppression under s 181, notwithstanding that the terms of the joint venture agreement had not been incorporated into the articles of association of the joint venture company. The court also found that, even though there existed a formally executed joint venture agreement between the shareholders, the company was, on the facts of the case, a quasi-partnership. Therefore the relationship between the parties would be governed not only by the terms of the articles of association and the joint venture agreement, but also by equitable principles.

[124] Now, His Lordship Kang Hwee Gee J was the same judge who had heard the case of (*Beh Chun Chuan v Paloh Medical Centre* discussed at para 100), which relied upon (mistakenly, in my respectful view) the decision of the House of Lords in *Russell v Northern Bank Development Corp*. In his later judgment in *Liew Teck Fook v Chan Yip Pooi*, Kang J explained his earlier decision in *Beh Chun Chuan v Paloh Medical Centre* in the following terms:

> The case is not an authority for saying that mutual pre-incorporation understandings between the parties such as in a shareholders 'agreement may not form the basis of 'oppression' or 'disregard' in a petition under s 181 in all cases and that acts of the directors or shareholders made pursuant to the Articles may not be subjected to equitable intervention by the court.

[125] The inter-relationship between joint venture agreements and oppression actions was considered recently by the Court of Appeal in Singapore in *Ho Yew Kong v Sakae Holdings Ltd* [2018] SGCA 33. The action in this case was premised upon s 216 of the Singapore Companies Act, which is substantially similar to our s 181 (and now s 346 of the Companies Act 2016). The minority shareholder in that case, Sakae Holdings, entered into a joint venture agreement with the majority shareholder and the joint venture company. The purpose of the joint venture was to acquire units in Bugis Cube, a shopping mall in Singapore. Sakae Holdings held 24.69%, with the remainder of the shares being held by the majority shareholder. The joint venture company was managed by one Andy Ho, who also controlled the majority shareholder.

[126] The minority shareholder alleged numerous breaches of fiduciary duties against Andy Ho. It also alleged that Andy Ho that procured a breach of the joint venture agreement by causing the joint venture company to grant to another company controlled by him options to subscribe for new shares in the joint venture company. The terms of the joint venture agreement required the unanimous approval of its shareholders for the grant of options by the company. Sakae Holdings, the minority shareholder, was only informed about the share option agreement after the options had been granted. In order to preserve its shareholding proportion in the company, Sakae Holdings had to subscribe for an additional $2.6m worth of shares in the company. The defendants argued that the contractual remedies in the joint venture agreement precluded the plaintiff minority shareholder from bringing the oppression action.

[127] The Singapore Court of Appeal held that, where the remedies under the joint venture agreement were adequate and appropriate to address the complaint of the aggrieved shareholder, then recourse ought to be pursued under the joint venture agreement. The courts would be unlikely to find oppression when there is alternative remedy available to the aggrieved shareholder.

[128] This case is instructive because it illustrates the principle that, just because a matter is set out in a shareholders' agreement or joint venture agreement does not *ipso facto* preclude it from being a matter relating to the affairs of the joint venture company to which the agreement relates. Sundaresh Menon CJ stated:

> One can easily conceive of possible situations where a shareholders' agreement in fact specifically concerns the affairs of the company in question. The JVA in the present case is an example of just such an agreement as it spells out, among other things, the business of the Company (cl 6), the composition of the Company's board of directors (cl 7) and the proceedings of directors' meetings (cl 8). In our

judgment, it is only where 'the complaint relates *purely* to inter-shareholder disputes, so *that neither the company nor its affairs are implicated*' (emphasis added) that an action under s 216 will be unavailable (see *Corporate Law* at para 11.041).

[129] In that case, the joint venture agreement provided for the ability of the non-defaulting shareholder to buy out the shares of the shareholder. This was not an appropriate remedy in that case, as it would have required the aggrieved shareholder to expend further capital into acquiring control over a company whose assets have been dissipated by the wrongful conduct of the defendants. The remedy under the joint venture agreement was thus neither adequate nor appropriate. This meant that the oppression action had been properly instituted.

[130] Having examined the authorities closely in this case, I am of the considered view that the applicable principles may be summarised into the following:

(a) the fact that the shareholders in a company, or the shareholders together with the company, have entered into a shareholders' agreement or joint venture agreement does not of itself preclude a claim for oppression by an aggrieved shareholder arising from conduct amounting to breach of that agreement;

(b) the contended breach must, however, pertain to a matter relating to the affairs of the joint venture company. Where the contended breach arises from a matter provided for in the shareholders' or joint venture agreement that relates solely to matters between the shareholders inter se, the claim must be pursued in contract and not under statute;

(c) just because the matter complained of pertains to the affairs of the joint venture company does not, however, mean that the courts will permit an action to be pursued under s 181 of the Companies Act 1965 (or now under s 346 of the Companies Act 2016). Where the shareholders' or joint venture agreement provides for an alternative remedy, the courts would be unlikely to find oppression. It is only if the contractually provided alternative remedy is not adequate or appropriate that the court will permit the action to be pursued under statutory cause of action for shareholder oppression;

(d) there may be instances where the conduct complained of will amount to oppression, even without taking into consideration the obligations of the shareholders *inter se* under the shareholders' or joint venture agreement. This was the case in *Ho Yew Kong v Sakae Holdings*, where the Court of Appeal held that all the conduct complained of 'were oppressive to Sakae *even without regard to the JVA*' (refer para 184); and

(e) in every case, the conduct complained of must fulfil one of the four

A categories of conduct proscribed by legislation: the act must have been oppressive to the aggrieved shareholder, or carried out in disregard of his interests, or an act that unfairly discriminates against, or is unfairly prejudicial to him. Thus, not all breaches of a shareholders' agreement or joint venture agreement will necessarily give rise to an actionable claim.

B

Whether the case for oppression has been made out

[131] As explained at para 47, I was of the view that the claim for oppression and unfair prejudice had been made out on three different and independent C bases:

(a) first, that the JV companies were quasi-partnerships;

(b) secondly, on the basis that the acts complained of contravened the terms of the oral shareholders' agreement between MPHB and ISM; and

D

(c) thirdly, in connection with the differing treatment of interest on the cash portion, even without regard to whether the JV companies were quasi-partnerships or whether there existed a shareholders' agreement between ISM and MPHB.

E

[132] The written submissions of counsel for the plaintiff advanced 25 separate instances of oppressive conduct, much of which, in my view, overlapped one another. Some of the instances of allegedly oppressive conduct could be usefully grouped into the following five broad areas:

F (a) the demand by MHPB dated 25 June 2014 that ISM contributes 30% of the purchase price for the De Vegas land that was acquired by Leisure Dotcom Sdn Bhd;

(b) the rights issues of shares undertaken by Queensway Nominees (Asing) Sdn Bhd, Queesway Nominees (Tempatan) Sdn Bhd and Mulpha G Kluang Maritime Carriers Sdn Bhd and the manner in which those right issues were carried out (involving the capitalisation of intercompany debt due to MPHB) which had the effect of diluting ISM holdings in each of these JV companies from 30% to fractions of one percent;

H (c) the imposition of interest on the shareholder advances made by MPHB for the cash portion of the funding to the JV companies;

(d) the refusal to re-elect Dato' Ray Cheah as a director of the five JV companies; and

I (e) the transfer of one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd and West-Jaya Sdn Bhd to Jayavest Sdn Bhd (which was another company in the MPHB group of companies) in order to fulfil quorum requirements for shareholders meetings.

[133] In the following paragraphs, I address each of these contentions in turn.

Leisure Dotcom Sdn Bhd and the De Vegas Land

[134] It will be recalled that, in April 2007, ISM entered into a contract to purchase the De Vegas Land on behalf of the joint venture. A formal sale and purchase agreement was entered into between Leisure Dotcom Sdn Bhd and the vendor some two months later. The parties to the sale and purchase fell into dispute, following which Leisure Dotcom Sdn Bhd sued the vendor for specific performance.

[135] On 25 June 2014 (more than seven years after the initial contract was signed), the Court of Appeal granted judgment in favour of Leisure Dotcom Sdn Bhd. On the very same day, MPHB sent an email to ISM with the following request:

> Please let us have the sum of RM19,483,740.00 being your 30% share of the balance purchase price to enable us to issue the full payment of RM64,945,800.00 in a single bank draft.

[136] The request for contribution of 30% of the purchase price was clearly not in accordance with the practice of the joint venture previously, where the plaintiff was required to contribute 30% of the cash portion, or 9% of the total acquisition cost of each property acquired under the joint venture. Understandably shocked at this request, Dato' Ray Cheah requested a meeting with Tan Sri Upatkoon. This meeting took place the following week. Dato' Cheah described the encounter in the following terms (Q&A 306 of WSP-1):

> For the first time in last 7 years, he was very unfriendly towards me and basically just told me to pay up. He told me that MPHB could not continue to finance the JV Companies and the Imbi Project. I told him that from the inception of the JV, [Kheoh And Yeang] had promised that MPHB would provide continuing financial support for the Imbi Project till completion. After some discussion we agreed that the Plaintiff would have 4 months to pay its 30% of the Cash Portion for the D'Vegas Lands and other matters were left unresolved.

[137] There was nothing in evidence that would lead me to disbelieve that this was what took place. Tan Sri Upatkoon was not called as a witness at trial. I therefore regard the Dato' Ray Cheah's testimony in this regard as being representative of the truth.

[138] Now, if the prior arrangements had been adhered to, ISM would have had to only contribute 30% of the cash portion. Accounting for the sums already paid by ISM at the time the sale and purchase was entered into with the vendor of the De Vegas land, the sum outstanding ought to have been RM4,329,720.

[139] Following this incident, ISM made a payment of RM400,000 to MPHB. Dato' Cheah explained this payment in the following terms:

> Out of desperation, I made a contribution of RM400,000.00 to the JV Companies to improve their cashflow position even though I was not asked to do so. I am already 64 years old and my family's entire life is in this Imbi Project and trying to salvage it without burning bridges with MPHB.

[140] In November 2014, ISM, through Dato' Cheah, tendered payment for the outstanding cash portion together with interest by way of bankers' cheques. These cheques were however rejected out of hand by MPHB.

[141] In my judgment, the conduct of MPHB and Leisure Dotcom Sdn Bhd in insisting on a 30% contribution of the total acquisition price for the De Vegas land coupled with the rejection of bankers' cheques for the 30% contribution to the cash portion constituted conduct that was oppressive of ISM as a shareholder in Leisure Dotcom Sdn Bhd and in disregard of its interests as such a shareholder. It was not in material dispute that the directors of those companies, save for Dato' Cheah and his wife, answered to, and acted in accordance with the instructions of, MPHB.

[142] On the basis that each of the JV companies were quasi-partnerships, it would not have been open to MPHB to unilaterally dictate to ISM how much it ought to contribute to the funding requirements of Leisure Dotcom Sdn Bhd. Such a decision could only have been made unanimously, by agreement between the shareholders. That was the basis upon which the parties had conducted their affairs up to that point, and it would have been inequitable for MPHB to insist upon exercising its legal rights under the articles of association as a majority shareholder to require ISM to contribute advances in an amount that departed from their prior practice. This prior practice existed both in relation to the other JV companies as well as in relation to the contributions paid to Leisure Dotcom Sdn Bhd at the time the sale and purchase agreement was entered into with the vendor of the De Vegas land.

[143] Even if the JV companies were not quasi-partnerships, I would have arrived at the same conclusion. MPHB's insistence that ISM make a contribution of 30% of the purchase price was unfairly prejudicial to the interests of ISM shareholder in Leisure Dotcom Sdn Bhd, assessed in the light of the oral agreement between them that ISM's contribution was to be 30% of the cash portion, or just 9% of the total purchase price of each land acquisition. This contravention of the oral agreement between the shareholders was not a mere trivial or technical non-compliance, but one that went to the root and substance of each party's participation in the joint venture. On this basis, the present case can be distinguished from *Jet-Tech Materials*, in which the Federal Court held that the contravention of the shareholders' agreement in that case

did not give rise to actionable oppression.

[144] Nor can it be said that this was a matter that operated as between the shareholders only. The evidence received at trial showed unequivocally that the directors of the JV companies other than Dato' Cheah and his wife, answered to, and had acted in accordance with the instructions of, MPHB. The issue of funding for Leisure Dotcom Sdn Bhd was clearly a matter relating to its business affairs, and not a private matter purely between the shareholders.

The rights issuances at QNA, QNT and MKMC

[145] MPHB had caused each of Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd to undertake a rights issue exercise. In the case of Mulpha Kluang, MPHB's interests were held through Multi-Purpose Shipping Corp Bhd, a wholly-owned subsidiary of MPHB. The effects on the shareholding of these rights issue exercises are summarised in the following table.

	QNA		QNT		MKMC	
	MPHB	ISM	MPHB	ISM	MPHB*	ISM
Pre-rights	70%	30%	70%	30%	70%	30%
Post-rights	99.99%	0.01%	99.98%	0.02%	99.95%	0.05%

(*Held through Multi-Purpose Shipping Corp Bhd)

[146] In each case, the rights issue did not raise any fresh capital for the relevant JV company, but was effected by way of capitalisation of intercompany debt. A brief explanation of the prior events will explain the provenance of these intercompany debts.

[147] It will be recalled that, beginning some time in 2009, the parties explored a corporate exercise, which contemplated the injection of the lands held by some of the JV companies into Caribbean Gateway Sdn Bhd. Even though the corporate exercise did not materialise, Caribbean Gateway nonetheless proceeded to obtain, and to draw down upon, four loans from Malayan Banking Bhd. Although the stated purpose of the loans was to finance the acquisition of the lands held by the relevant JV companies at that time, Caribbean Gateway never in fact acquired the lands from the JV companies. Instead, the proceeds of the Maybank loans were on-lent to JV companies, which then used the proceeds to repay the shareholder advances made to the JV companies by MPHB.

[148] It will be seen that, what was previously a shareholder advance from MPHB bearing interest at a rate of 8%pa had now been substituted with bank

loans bearing interest at commercial rates. The borrower on record was Caribbean Gateway, but the loan amounts were ultimately utilised by the relevant JV companies.

[149] On 29 January 2015, a directors' circular resolution of Caribbean Gateway was purported to have been passed. (By this time, the dispute between the parties regarding ISM's contributions to Leisure Dotcom had come to a head.) This resolution recorded:

(a) the novation to MPHB of the outstanding debts due from Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and West-Jaya Sdn Bhd; and

(b) the novation to Multi-Purpose Shipping Corp Bhd of the outstanding debts due from Mulpha Kluang Maritime Carriers Sdn Bhd.

[150] Of course, the directors' resolution itself is not the instrument by which the debts are conveyed, but be that as it may, the validity or otherwise of the novation of debts was not a material issue before me. What was material, however, was the fact that MPHB had caused the debts due to Caribbean Gateway to be assumed by MPHB and Multi-Purpose Shipping Corp Bhd, or had at any rate purported to do so.

[151] With these novations, the debts once again became due by the relevant JV companies to MPHB and, in the case of Mulpha Kluang, to Multi-Purpose Shipping Corp Bhd. This paved the way for the rights issuances by the three JV companies, where the debts owning to MPHB and Multi-Purpose Shipping Corp Bhd were capitalised, resulting in the dilution of the interests of ISM in the JV companies.

[152] In the case of West-Jaya Sdn Bhd, even though a rights issue was proposed, the resolution was not carried, as its articles of association required a special resolution to be passed. Because ISM held 30% of the ordinary shares, a special resolution could not have been passed without its concurrence.

[153] In my judgment, the rights issuances of shares at Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd was oppressive of ISM as a shareholder in those three JV companies and was in disregard of its interests as such a shareholder. The reasons are as follows.

[154] Firstly, because of the nature of the relationship of mutual trust and confidence between ISM and MPHB, it would not have been open to MPHB to carry out an exercise to increase the share capital of the JV companies by the rights issue without the assent and approval of ISM. Such an exercise could

only be described as a betrayal of the mutual trust that had underpinned the relationship between them. In this case, it would not have mattered whether MPHB knew or could reasonably have supposed that ISM would not have been able to take up its rights entitlement. The relationship, by the defendant's own evidence, had proceeded upon the basis of consensus for many years, and to depart from that principle at that stage of the project — once all the lands that were needed to be acquired had been procured — would have been an iniquity that this court would not permit.

[155] The fact that the rights issue to MPHB and Multi-Purpose Shipping Corp Bhd was carried out by converting the MPHB shareholders' advances to equity (comprising both loan and the cash portions) meant that no additional funds were raised by the rights issue exercises. This lent support to the contention that the motive of the rights issue exercises was nothing other than to dilute the plaintiff's interests. However, for the reasons explained in the preceding paragraph, even absent such an ulterior motive, the rights issue could not have been carried out without the assent of ISM, because unanimity and consensus formed the very basis of the relationship of trust and confidence between them.

[156] It almost goes without saying that the right issue was prejudicial to ISM, for it had resulted in a dilution of the plaintiffs' interests from 30% to fractions of one percent, as illustrated in the table at para 145.

[157] Secondly, even assuming for the moment that the JV companies in question were not quasi-partnerships, the rights issue exercises would have breached the terms of the oral agreement between ISM and MPHB that the shareholding proportions would be maintained at a 30:70 ratio. The basis of the agreement of the parties was that MPHB would provide 91% of the funding required, but that ISM would be entitled to 30% equity participation, due to the particular skill and experience that Dato' Ray Cheah brought to the table in acquiring the lands to be utilised for the Imbi Project. To my mind, it would be doubtful if the JV companies could have proceeded to accumulate the lands in the manner that they did without the contribution of Dato' Cheah. To compensate MHPB for the additional funding that it would provide, the loan portion — comprising 70% of the total funding required — would accrue interest at a rate of 8%pa. Those were the terms of the agreement between the parties. The rights issue indisputably tore out the very heart of this agreement.

[158] In addition, the oral agreement between the parties also contemplated that decisions affecting the JV companies — at any rate major decisions — would be made by consensus between the shareholders. The assent of ISM had not been sought for the proposal for the rights issues in this case, which meant that the manner in which the rights exercises were carried out contravened the

oral agreement, even if ISM possessed the financial wherewithal to take up its rights entitlements. The rights exercises were also unfairly prejudicial to ISM because it would have had to inject fresh funds into the affected JV companies simply to maintain the shareholding ratio at 30:70. This was because the loan portion advanced by MPHB had also been capitalised into ordinary shares. Even if all the advances made by ISM (comprising 30% of the cash portion) had been similarly capitalised, ISM's shareholding in the relevant JV companies would still have been diluted.

Imposition of interest on cash portion

[159] The plaintiff's position was that the cash portion was not to bear interest. It was, in other words, to be treated as quasi-equity. The defendants, for their part, denied that this was the case, citing the fact that the listing requirements of Bursa Malaysia and the relevant transfer pricing guidelines would have prevented MPHB from lending to a subsidiary or related company without charging interest.

[160] It may well be that MPHB was so restricted, but the real question was, what did the parties agree? In my considered opinion, it was more likely that the parties did agree that the cash portion was not to bear interest, but that MPHB realised, belatedly, that it could not have advanced an interest-free loan to the JV companies without contravening the applicable transfer pricing guidelines.

[161] My reason for so concluding was that, otherwise, there would not have been any necessity to distinguish between the 'cash portion' and the 'loan portion'. If both portions were to bear interest, then why distinguish between the two?

[162] Having realised, belatedly, that it would not have been permissible for the cash portion to be advanced interest-free, the proper course for MPHB would have been to bring the matter up with ISM as its joint-venture partner, and agree upon a mutually acceptable solution. For instance, it could have agreed with ISM that interest would accrue on the cash portions advanced by both ISM and MPHB.

[163] That, however, was not what happened.

[164] From 2007, no interest was charged on the cash portion advanced by both shareholders to Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and West-Jaya Sdn Bhd. Interest was however paid rateably to both shareholders in respect of the cash portion advanced to Leisure Dotcom Sdn Bhd. From 2010 onwards, MPHB caused the JV

companies to pay interest to itself on the cash portion of the advances made by MPHB, but not the cash portion advanced by the ISM. This, it would appear, was not known to ISM at the time.

[165] In February 2015 — after matters came to a boil — Dato' Ray Cheah requested for copies of the accounts for all the JV companies, with the general ledgers and other supporting documents, breakdowns and summaries of the financial figures.

[166] In response to this request, unaudited management accounts were provided in March 2015, but the supporting documents and financial ledgers were not provided. It will be recalled that, at this point in time, Dato' Cheah was not a director at any of the JV companies. ISM was represented on the board of Queensway Nominees (Asing) Sdn Bhd and Queensway Nominees (Tempatan) Sdn Bhd by Datin Teoh, Dato' Cheah's wife, whereas it had no representative on the boards of the other JV companies. (This in itself spoke volumes about the relationship of mutual trust and confidence that existed between the parties before matters began to deteriorate between them.) It was only at the end of April 2015 and the beginning of May 2015 that Dato' Cheah obtained a seat on the board of all the JV companies, after he had made such a request following receipt of the notices for the extraordinary general meetings.

[167] After having been appointed as director of the JV companies, Dato' Cheah renewed his request for the financial records and supporting documents. On 15 June 2015, Dato' Cheah was able to view the financial documents of the JV companies, but no supporting documents was available. Two days later, the annual general meetings of the JV companies was held where Dato' Ray Cheah was not re-elected as a director. On the very next day, 18 June 2015, the company secretary to the JV companies informed ISM that, because Dato' Cheah was no longer a director of the companies, the corporate records would not be made available for inspection.

[168] The events narrated in the foregoing paragraphs were sufficient, in my mind, to warrant a finding of oppression and unfair discrimination. Firstly, there was no reasonable justification why there had been a differing treatment regarding interest on the cash portion advanced by the respective shareholders, which of itself justified a finding of oppression of the rights of ISM as shareholder in all of the JV companies, of unfair discrimination against it and of disregard of ISM's rights shareholder.

[169] The finding in para 168 was not predicated on either a finding that the JV companies were quasi-partnerships or *Ebrahimi*-type companies, or that the conduct complained of amounted to a breach of the terms of the oral joint venture agreement between them. In other words, I would have found for the

plaintiff on this specific ground of complaint even if (a) the joint venture between the parties was not one founded upon the: mutual trust and confidence between the parties; or (b) there did not exist any agreement between the parties governing their relationship in the JV companies.

[170] Secondly, the refusal to provide financial information to a shareholder when the joint venture company in question was a quasi-partnership would also, in my view, justify a finding of shareholder oppression. The way in which MPHB had caused the JV companies to refuse to provide the financial records, ledgers and supporting documents suggested that it was less than fully transparent on the manner in which the financial affairs of the JV companies had been conducted, and this in turn prevented ISM from discovering about the unequal treatment of the shareholder advances.

The refusal to re-elect Dato' Cheah

[171] It was contended by the plaintiff that the refusal by the directors of the JV companies to re-elect Dato' Cheah as a director of the JV companies amounted to oppression of its rights as a shareholder.

[172] I was unable to agree with this submission. If ISM had been perfectly content to proceed with the business relationship without a representative on the boards of West-Jaya Sdn Bhd, Leisure Dotcom Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd, then the subsequent removal of its representative would be of no particular consequence.

[173] This, however, does not change the fundamental basis of the relationship, which was that all or all major decisions affecting the JV companies could only have been made and implemented with the concurrence of both ISM and MPHB.

The transfer of one share to Jayavest to overcome quorum restrictions

[174] In October and November 2014, MPHB had transferred one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd and West-Jaya Sdn Bhd to its subsidiary company, Jayavest Sdn Bhd. This was after the dispute regarding Leisure Dotcom Sdn Bhd had arisen, but before the rights issue exercises were undertaken. Not coincidentally, these three JV companies were the companies in which ISM had no board representation.

[175] The reason for the introduction of Jayavest as a shareholder was to ensure that the general meetings of the relevant JV companies would not fail to

meet the requirements for a quorum, in the event that ISM did not attend any such meeting called. This was admitted at trial Ms Ivevei Upatkoon, who was a director of all five JV companies.

[176] I am of the view that the transfer of the one share, in and of itself, was not oppressive of ISM or prejudicial to its interest. It would not be uncommon for a joint venture agreement to permit intra-group transfers without triggering the pre-emptive rights of the other shareholder(s). In the present case, it was not the transfer of one share in the relevant JV companies that was objectionable, but rather the rights issue proposal was forced through the general meetings in the face of objections by ISM.

SUMMARY

[177] The preceding paragraphs explain why:

(a) the demand for 30% contribution at Leisure Dotcom Sdn Bhd amounted to oppression of ISM's rights as a shareholder at Leisure Dotcom;

(b) the rights issue exercises by Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd was oppressive and unfairly prejudicial to the rights of ISM as a shareholder of these three JV companies; and

(c) the differing treatment of the cash advances by each shareholder amounted to unfair prejudice and unfair disregard of the rights of ISM as a shareholder in all the JV companies.

[178] The joint venture in this case brought together two parties that were able bring starkly different value propositions to bear in the relationship. Dato' Ray Cheah was seasoned real estate professional, who had conceived of the idea of accumulating and amalgamating all the contiguous lots adjacent to the CN lands, and to transform the whole into an integrated commercial development. MPHB had, by circumstance, acquired the CN lands as a result of a defaulted credit facility granted by one of its subsidiaries. It was Dato' Cheah who had approached MPHB with the idea of amalgamating the adjacent lots with the CN lands. While MPHB had no prior experience in real estate investment and development, it had, unlike Dato' Ray Cheah, considerable financial resources.

[179] It appeared at that time that the parties were well matched.

[180] At first glance, the structure of the joint venture would appear to be a little one sided: ISM would only provide 9% of the funding required for the acquisitions but would hold 30% equity interest in the JV companies. However, when one considers the skill and experience that Dato' Cheah

A brought to the relationship, the terms made sense. Indeed, it is not unusual for similar structures to be adopted in private equity investments and other areas of finance. In Islamic financing, a mudharabah joint venture describes a relationship where financial backing is provided by a *rabbul-mal*, with the *mudharib* providing management expertise. The mudharib may enjoy equity upside that is out of proportion to his capital contribution.

B

[181] As events turned out, the faith in Dato' Ray Cheah was not misplaced.

C **[182]** Beginning in April 2007, ISM through Dato' Cheah, worked to acquire the adjacent properties for the joint venture over the next several years. Even where the properties were eventually acquired by a MPHB company that was not a JV company, it was not denied that those acquisitions had been the result of work undertaken by ISM.

D

[183] The final piece of the real estate puzzle was the De Vegas land, which was only resolved after litigation at the Court of Appeal. Once that was resolved, the tide suddenly turned against Dato' Ray Cheah and ISM. Was it because, once all the properties had been acquired, MPHB viewed ISM as

E having outlived its usefulness? Whatever the case, it would have been apparent at that time that, because the joint venture had proceeded theretofore on the basis of the mutual trust and confidence reposed upon one party by the other, they had not entered into any formal legal documentation defining the limits of each parties' rights and obligations. MPHB, having accrued the benefit of

F the relationship of mutual trust and confidence that defined the joint venture, would not now be permitted to turn to the strict letter of the articles of association of the JV companies and to proclaim that these were all that governed the relationship between the shareholders inter se.

G

[184] I do not consider it necessary to address specifically the myriad other contentions of oppression put forth by learned counsel for the plaintiff. Suffice to say that the foregoing issues addressed the substance of the plaintiff's complaints.

H

Personal liability of the directors

[185] The plaintiff claimed that the directors of the JV companies who were nominated by MPHB had acted for an improper purpose and in breach of their

I fiduciary duty by suppressing documents or failing to provide adequate disclosure of information to ISM in connection with the rights issue.

[186] It is therefore pertinent to note that the plaintiff's claims against the directors personally, as advanced by the written submissions of counsel, was focused on the conduct of the directors relating to the rights issue (see p 185 of the plaintiff's written submissions).

[187] In my judgment, the contention of the breach of duty claimed by the plaintiff did not have any effect on the plaintiff's claim for damages or its prayer for an order that its shares to be bought out. Whether or not the directors had provided information that had been requested by the plaintiff would not have changed the outcome of the rights issue. It was not as though the plaintiff had been misled by the lack of information to vote in favour of the rights issue. Similarly, whether or not the information had been provided would not have changed the fact that MPHB would have voted in favour of the rights issue. There was, in other words, no causation between the remedies sought by the plaintiff in respect of the rights issue and the acts of the directors of the JV companies in refusing the information that had been sought by the plaintiff prior to the extraordinary general meetings approving the rights issuances by the JV companies.

[188] For this reason, I dismissed the claim to make the directors personally liable.

General, exemplary and punitive damages

[189] The plaintiff, in its statements of claim for the five suits, prayed for general damages, exemplary damages and punitive damages. Although ample opportunity was given to counsel to advance submissions, none of the plaintiff's principal submissions, executive summary or submissions in reply addressed its claim for exemplary or punitive damages. For this reason alone, I considered that I would have been justified to dismiss these heads of damages.

[190] In any event, I was also of the view that the plaintiff had not proven circumstances that justify any award for exemplary or punitive damages. For instance, it was not established in evidence that the defendants had acted out of vindictiveness or malice, or whether they had simply acted out of a misapprehension of the true terms of the joint venture. In *Sambaga Valli K R Ponnusamy v Datuk Bandar Kuala Lumpur* [2018] 1 MLJ 784; [2018] 4 AMR 745; [2018] 3 MLRA 488, the Court of Appeal explained exemplary damages in the following terms:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

A [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he B has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff. (See *Rookes v Barnard* [1964] 1 All ER 347; *A B v Southwest Water Services* [1993] All ER 609 *Broome v Cassell & Co* [1971] 2 QB 354, C *Laksamana Realty Sdn Bhd v Goh Eng Hwa and Another Appeal* [2006] 1 MLJ 675; [2005] 4 CLJ 871).

[191] If MPHB had been operating under the mistaken belief that the terms of the joint venture required a contribution by the plaintiff of 30% of the total D funding requirement of the JV companies, then quite clearly MPHB would also have taken the view that the failure by the plaintiff to advance the sums requested would have been a breach of their agreement. As explained earlier, the dispute between the parties boiled over when MPHB made a request in June 2014 for a contribution of 30% of the remaining purchase price for the E De Vegas land. In my judgment, the plaintiff had not proven at trial that the change in MPHB's position in June 2014 when compared to the numerous calculations in spreadsheets that it had sent to ISM (enumerated at para 81) was due to vindictiveness, malice or contumelious disregard of the plaintiff's rights.

F

[192] I allowed nominal damages in favour of the plaintiff, as I was of the view that an order for MPHB to buy out ISM's minority stakes in the JV companies adequately addressed the plaintiff's claims in this case.

G

The plaintiff's other prayers for relief

[193] The plaintiff also sought for other prayers for relief, in addition an order that its shares in the JV companies be bought out by the defendants. These H prayers included a declaration that the board meetings relating to the rights issue by the relevant JV companies were invalid, that the related extraordinary general meetings were invalid, and that all resolutions passed at those meetings were similarly invalid. The plaintiff also sought for the actions taken pursuant to those resolutions to be set aside, including the rights issues and the novation I of the Caribbean Gateway debt. An injunction was sought to restrain any further dilution of the plaintiff's interests in the JV companies and to restrain any further issuances or disposal, to restrain the defendants from giving effect to the resolutions passed, or from committing any further breaches of the terms of the oral shareholders' agreement.

[194] I refused these orders because the substance of the plaintiff's complaint would have been adequately addressed by the order for MPHB to buy out ISM's shares in the JV company. The order for the plaintiff to be bought out means that the plaintiff would be given an exit from the JV companies at a valuation that reflects the fair market value of its shares. Having sought, in its alternative prayers, for a buy-out order, the plaintiff would not, in my judgment, be also entitled to dictate the manner in which the JV companies are to be run in the future. The plaintiff would have no further commercial interest in the shares, as its interests are crystallised as at the valuation date for the shares in question.

[195] The plaintiff also sought an order that the valuation of the shares be made on the basis of the development value realisable from the joint venture development in the Imbi Project.

[196] I refused this order because I was of the view that the method of valuation ought to be determined by the independent accountant in consultation with the real estate valuer to be appointed, as they are the subject matter experts and would be best placed to make what will ultimately be a commercial determination. In the case of *Zen Courts v Bukit Jalil Development (No 5)* [2019] MLJU 1308; [2019] AMEJ 1415; [2019] 1 LNS 1735; [2019] MLRHU 1296, I had expressed the following view:

> 26. It will be apparent that it is less than ideal for the court to determine the valuation, rather than for an expert valuer to do so. Judges, by inclination, experience or qualifications, are not well equipped to make assessments on commercial value of assets. The way in which the order had been drawn up, however, mandates that this be done, and as such, it will be necessary for this court to delve into somewhat unfamiliar territory, in order to exercise commercial judgment on what would be the value of the subject shares.

[197] These observations would apply in the present case. In that case, the prior order of the court was for the valuation of the buy-out shares be made by the court, and not by the independent expert appointed. Hence it was necessary in that case for the court to examine the bases and assumptions underlying the valuation, which for the reasons explained, was less than ideal.

[198] The second reason that I refused the order prayed for was that undertaking the valuation based solely on the expected development value of the Imbi Project may overstate the fair value of the shares, because it ignores the uncertainties and risks attendant in a project of such a nature. In the same case cited above, I had stated as follows:

> *Averaging expected outcomes*
>
> 38. The DCF method was used to ascertain the present value of the future cashflows that were predicted from the development and sale of the Pavilion Bukit Jalil

project. This was then used to ascertain JV Co's entitlement under the JDA. However, if only the NPV of the expected cashflows under the JDA were used, it would ignore the risks and uncertainties present in all human endeavours. It would amount to only considering what the best-case scenario was for JV Co. Therefore, in my view, it was necessary to also consider what the worst-case scenario would be, and to average the expected outcomes for the best case and the worst case.

39. The worst-case scenario, in my view, involved a sale by JV Co of the undeveloped land, which meant undertaking a raw land valuation.

[199] In that case, the gross development value was ascertained with the assistance of expert testimony, and the future cashflows arising from sales of the development was modelled. These future cashflows were then discounted to present value (using a method referred to as discounted cash flow, or DCF). This methodology arrived at the valuation of the development in the best-case scenario. It would not have been appropriate to only use this figure, because it assumed the probability of success of the development as a certainty. Consequently the court adopted a method by which the DCF valuation (derived from gross development value) was averaged with the valuation based on raw land.

[200] In summary, I was of the view that it would not be appropriate for the court to direct that the valuation be undertaken on the basis of the development value of the Imbi Lands because:

(a) the precise valuation methodology to be employed should be within the province of the independent firms of accountants and valuers that were to be appointed; and

(b) in any event, gross development value may be just one of the considerations in the valuation exercise, and to use it solely may risk overstating the fair value of the shares in question.

The counterclaims

[201] MPHB counterclaimed against ISM in all five suits. It sought for a declaration that the joint venture arrangement had been terminated by reason of ISM's breach of its obligations to contribute 30% of the total funding required by all five JV companies. It also sought to recover interest on 30% of the Maybank loans and the opportunity costs on 70% of the interest paid to Maybank for the Maybank loans.

[202] Consequent upon my finding that there was no obligation on ISM to contribute to 30% of the funding required, there was thus no breach by ISM of the oral agreement between ISM and MPHB governing their joint venture in the JV companies.

[203] In as far as the Maybank loans were concerned, the loans had refinanced MPHB's advances to the JV companies, in respect of which ISM bore no liability for interest.

[204] Accordingly, the counterclaims of MPHB in all five cases were dismissed in entirety.

ORDERS

[205] For the reasons explained above, I allowed the ISM's claim in part. There were orders as follows:

(a) I directed that MPHB (being ultimate holding company of Mulpha Kluang Martime Carriers Sdn Bhd through its holdings in Multi-Purpose Shipping Bhd and the majority shareholder in the other JV companies) buys out the shares of ISM in the JV companies. For this purpose, the holdings of ISM in the JV companies are to be taken as that prevailing immediately before the dilution of its shareholdings in the relevant JV company, as applicable;

(b) in respect of each of the JV companies that had carried out rights issues, the valuation date was to be one day prior to the approval of the rights issue at its extraordinary general meeting, specifically:

(i) in the case of Queensway Nominees (Asing) Sdn Bhd: 5 April 2015;

(ii) in the case of Queensway Nominees (Tempatan) Sdn Bhd: 5 April 2015; and

(iii) in the case of Mulpha Kluang Maritime Carriers Sdn Bhd: 4 March 2015;

(c) in respect of each of the JV companies that had not carried out rights issues, the valuation date was to be 21 June 2019;

(d) the buy-out price was to be determined by an independent firm of accountants, taking into account land valuations determined by a valuer licensed under the Valuers, Appraisers, Estate Agents and Property Managers Act 1981. The identities of the firm of accountants and the valuer were to be determined by agreement between the parties no later than four weeks from the date of judgment. If the parties failed to agree, they were to each nominate within a further period of four weeks three firms of accountants and valuers, and the court will chose from among them;

(e) the land valuations are to be undertaken on the basis of a valuation of all the lands in the Imbi Project as an integrated whole including the interests held in all lands adjacent to the Imbi Project held by MP Factor Sdn Bhd and Caribbean Gateway Sdn Bhd, but excluding the value of

such lands. In other words, the valuation should assume that all the contiguous lots would be developed on an integrated basis, whether or not the lots were owned by a JV company or by the other two companies;

(f) the basis for valuation will be determined by the independent firm of accountants, based on what it considers to be the most appropriate method or methods. The determination of buy-out price will be binding on the parties;

(g) the balance payable by ISM in respect of the De Vegas land (amounting to RM4,329,720) was to deducted from the buy-out price;

(h) upon determination of the identities of the accountant and the valuer, their proposed terms of engagement will be reviewed by the court. The terms of engagement will be executed by each of ISM and MPHB as clients. ISM and MPHB shall equally bear the costs of the accountant and the valuer;

(i) a draft valuation report will be given to the parties in accordance with a deadline to be determined by the court. Parties will be given time to comment on the draft report, which comments shall be considered by the accountant in finalising its valuation report, but without affecting its independence and discretion to make the determination of the final value;

(j) all timelines will be determined by the court;

(k) nominal damages of RM10,000 were allowed as general damages in favour of the plaintiff;

(l) the plaintiff's claims for punitive and exemplary damages were dismissed;

(m) the counterclaims against the plaintiff were dismissed;

(n) interest was to accrue on the general damages awarded at a rate of 5%pa from 22 June 2019 until full satisfaction;

(o) interest was to accrue on the buy-out consideration at a rate of 5%pa from a date expiring seven days from the final determination of the buy-out price by the independent accountant until payment has been made in full;

(p) costs were awarded to plaintiff in the amount of RM100,000, which costs were subject to an allocatur; and

(q) parties were granted liberty to apply. For the avoidance of doubt, the court was not *functus officio* with the entering of judgment in favour of the plaintiff, and remains competent to grant consequential orders in order to provide carriage to the orders granted.

Plaintiff's claim allowed in part with costs of RM100,000; defendant's counterclaims dismissed.

Reported by Mohd Kamarul Anwar